WAYS OF READING THE CONSTITUTION

by

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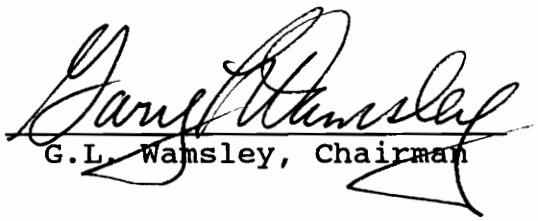

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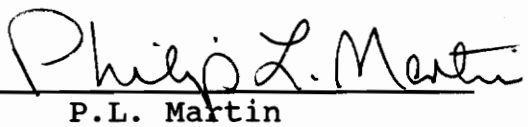

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(ABSTRACT)

This thesis explores various approaches to constitutional interpretation, paying particular attention to the literalist approach to reading the Constitution set forth by W.W. Crosskey in Politics and the Constitution. Crosskey's approach is compared to and contrasted with John Rohr's intentionalist approach to reading the Constitution and the approach of judicial activism.

Drawing from literary theory, this thesis outlines Stanley Fish and Robert Scholes' approaches to reading. Fish, like judicial activists, subordinates the text to the reader. Scholes, like Crosskey, argument for textual primacy. These literary critics mirror the debate in constitutional scholarship over where meaning lies: with the text or with the reader.

The debate over interpreting the Constitution adds to the tradition in public administration of normatively grounding the discipline in the Constitution. If this attempt at finding a normative grounding for public administration is to be successful, it must consider issues of interpretation.

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Acknowledgements

I will avoid the customary mea culpa that usually takes place as the final stage in writing up an academic project. There are mistakes, both glaring and trivial, for which I am apologetic but from which I am happy to learn. As Mina Shaughnessy suggests, errors are not a sign for distress, they are something to welcome as an opportunity for growth and learning.[1]

I would, however, like to thank those who have assisted me in completing this thesis. Gary Wamsley has been a patient and good humored chair, as well as a learned instructor for the last year I have dawdled over this project. John Rohr taught me a great deal about the Constitution and political philosophy, and has provided me with valuable and much appreciated feedback. Phil Martin let me drag him off of his vacation in August to read this essay and then participate in its defense. I thank him for going above and beyond the call of duty.

I dedicate this thesis to Jean Hovey.

Introduction

"Is the shopping list really worth so much?"
"Oh, it's worth everything," Ned replied carelessly. "If any of it's worth anything, that is"
"Oh and note was taken. Passively, since active verbs have an unpleasant way of betraying the actor"

--John LeCarre The Russia House

Robin Feuer Miller, in her 1981 study of Dostoyevsky and the Idiot, includes an appendix on "The Phenomenology of Reading," observing that "Studies of readers and readership are fashionable today".[2] At the risk of being fashionable, I intend to study ways of reading the Constitution. For this idea I must acknowledge my debt to John Rohr, who first led me to stumble upon it with a footnote in his To Run a Constitution.

Rohr contrasts his own way of reading the Constitution, through the lens of the Framer's intent, with W.W. Crosskey's literalist approach to reading. Contrasting Rohr and Crosskey's approach to reading led me to conclude, with the assistance of other interested parties, that Rohr and Crosskey's approaches to reading are different, but hardly incompatible. On the other hand, looking at ways of reading

the Constitution led me to a radically different approach, judicial activism, which reads the Constitution through the lens of expediency, interpreting the document to address whatever problems history might present.

Justice William Douglas exemplified the approach to the Constitution which is often disparagingly labeled as "judicial activism." In describing the Warren Court's approach of reading the Constitution Kelly, Harbison, and Belz remark of Douglas in particular:

> Sometimes interpretive creativity became sheer inventiveness, as in Justice Douglas's identification of a right of privacy out of the "penumbras" of the First Amendment in the Griswold case. More often, commentators and judges concealed or glossed over such inventiveness by describing the Court's policy-making actions as evidence of the fact that the United States had a living Constitution.[3]

The living Constitution metaphor, in Douglas's hands, therefore became something of a judicial blank check, enabling him to read the document as he saw fit without regard to any intrinsic meaning in the document. From an activist perspective, the Constitution must be able to adapt to all situations that may arise over time. Because of the impractibility of using the amendment process to change the Constitution as often as activists believe is required, activists prefer to change the Constitution through judicial decisions.

As for literalists, exemplified by Crosskey in legal

scholarship and Justice Black in jurisprudence, the meaning of the Constitution could be found in the text and the text alone.[4] Kelly, Harbison, and Belz remark: "Taking a literalist view of the Constitution, Black said the framers of the First Amendment had done all the balancing between liberty and security that was required; it only remained for the Justices of the Supreme Court to follow their instructions."[5] The Constitution meant what the Constitution said. Nothing more was required in interpreting the document than the text itself. While it is impossible to fully decontextualize a document, to remove all interpretive activity from reading, Black sought as much as possible to practice "judicial restraint," to determine only the constitutionality of a law, not its wisdom. For Black, the Court's role was a narrowly circumscribed one; the Court was not to be a superlegislature seeking to remedy all manner of social ills.

My discussion of this debate begins with brief review of the theories of Constitutional interpretation, focusing particularly on the debate over judicial activism. I then discuss the Supreme Court's decisions in Lochner v. New York, Griswold v. Connecticut, and Roe v. Wade. In doing so I hope to suggest that judicial activism is hardly confined to any particular ideological perspective. I also seek to illustrate how the theoretical debate on reading the Constitution is reflected in actual decisions. To further illustrate this

point, I include a discussion of the dissenting opinions in all three cases, which offer a look at (qualified in some cases) literalism in practice.

I then contrast judicial activism with a discussion of Crosskey's textual analysis of the Constitution, an imposing academic project that outlines a literalist approach to the Constitution in the manner of Justice Black. Crosskey views all meaning as residing in the text and conceptualizes the reader's responsibility as uncovering the one true meaning of the text. Just as Christians sought the "True Cross" throughout the Middle Ages, so Crosskey seeks the one true Constitution. In doing so, he argues that all the reader needs to understand the Constitution is an understanding of the text itself. In so arguing, Crosskey places the two centuries of constitutional interpretation in a subordinate role.

In contrast, John Rohr's reading allows for examining the intent of the Constitution's framers, as well as the actual text of the document. This represents a position between Crosskey's literalist insistence on the text and only the text, and activists' periodic subordination of the text to the demands of a particular moment in history. Rohr position is nevertheless conservative, closer to a literalist approach than an activist approach. Rohr therefore emphasizes the three-person Publius of The Federalist Papers, thereby

revealing the intent of at least the most Federalist of the framers, rather than restricting his reading to the text itself. In doing so, Rohr argues for the legitimacy of the administrative state, which is never mentioned in the text of the Constitution but perhaps is envisioned in the minds of some of the Framers.

Judicial activism is different from both Crosskey's literalist approach and John Rohr's intentionalist approach.[6] Judicial activists consider more than simply the text of the Constitution. Activists also consider more than the text plus the intent of the Framers; activists consider the evolving standards of society, the changing needs of society over time, and the wisdom of a particular law. Stanley Fish's notion of interpretive communities outlines the literary theory behind an activist approach to the Constitution. Exploring in some detail Fish's view of the authority of interpretive communities, I seek to outline a theoretical justification for an activist approach to the Constitution, or any text, an approach that gives all power to the reader.

I qualify this justification, however, with Robert Scholes' critique of Fish in Textual Power. In doing so, I suggest why it is that texts matter, why all interpretive authority should not be in the hands of the reader. Indeed, Scholes qualified defense of a textual reading seems closest

to Rohr's intermediate position.

Having laid out the main figures in this debate over interpreting the Constitution, I suggest that different approaches to reading are participants in our constitutional civil religion. What this religion will mean forms the stakes for the competition between these way of reading. Refounding Public Administration illustrates what an intentionalist reading of the Constitution, mindful of its place at the center of American civil religion, can accomplish. As such, Wamsley et. al. argue that the Constitution can become a covenant which public administrators can reflect upon in developing their professional identity and normative grounding in carrying out their duties.

While Refounding Public Administration suggests what can be accomplished with an intentionalist reading, Crosskey illustrates the value of literalist orthodoxy for American civil religion. W.W. Crosskey remains as a "mighty bulwark" reminding us that texts matter, particularly the constitutional text.

My own work seeks to extend the tradition of David Rosenbloom,[7] who suggests that constitutional literacy is an important part of a bureaucrat's education, and of John Rohr's attempts at constitutionally legitimating the administrative state. While these works highlight the importance of the Constitution for public administration, I seek to add the

importance of the way of reading the Constitution. The Constitution is not revealed truth, to be passively accepted. Rather, the Constitution is a text, which as Crosskey teaches us, must speak for itself and, as Fish and Scholes suggest, the text interacts with the reader. The result is a variety of readings of the Constitution; not a single most valid reading.

I hope to add the notion of ways of reading and readership to notions of what constitutional literacy for bureaucrats is. Constitutional literacy is more than being able to recite, upon demand, the various articles of the document. Constitutional literacy includes an awareness of one's interpretive approach. Does reading mean deciphering the meaning of the text and only the text? Does reading include unlocking the intentions of the authors of the text, as well as the words on the printed page? Does reading mean adapting a text to the changing circumstances and sensibilities of society?

Chapter 1:

The Theory and Practice of Judicial Activism and Its Opponents

Robert Cushman, in his commentary on Roe v. Wade, quotes Justice Stewart's remark that:

> The Court today does not pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution demands. Although this quotation from Justice Stewart by the Court in San Antonio v. Rodriguez (1973) states the orthodox view of the Court's role, few scholars today would subscribe to it.[8]

Stewart's words echo an orthodox tradition originally articulated by James B. Thayer. According to Wallace Mendelson, "James Bradley Thayer was one of the major figures in American constitutional law if only because of his influence upon Holmes, Brandeis, and Frankfurter (to say nothing of Learned and Augustus Hand)."[9]

Thayer defined his limited scope of the judiciary's interpretive authority over the Constitution, remarking:

> Again, where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the constitution. In doing this the court was so to discharge its office as not to deprive another department of its proper power, or to limit [it] in the proper range of its discretion . . . these questions, when presenting themselves in the Court for judicial action, . . . especially . . . require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgement of a legislative body.[10]

Thayer lays out the doctrine of judicial respect for legislative decisions, a view that holds that judges should only overrule legislative action when such action is explicitly forbidden by the Constitution. Widely practiced in the jurisprudence of Holmes, and Brandeis, this doctrine was resuscitated by opponents of the Warren Court under the name of "judicial restraint."[11]

Thayer emphasizes that the judiciary is only one of the constitutional safeguards designed by the framers to thwart legislative acts that might infringe on the people's s liberty. Thayer remarks:

> It was, then, all along true that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference is but one of many safeguards, and its scope was narrow.[12]

Thayer rejects, however, a literalist approach to the Constitution. He decries "petty methods" that lose sight of "that combination of a lawyer's rigor and a statesman's breadth of view which should be found in dealing with this class of questions in constitutional law."[13] Thayer evokes the late Chief

Justice Marshall's judicial philosophy in remarking:

> In order, however, to avoid falling into these narrow and literal methods, in order to prevent the courts from forgetting, as Marshall said, that "it is a constitution we are expounding," these literal precepts about the nature of the judicial task have been accompanied by a rule of administration which has tended, in competent hands, to give matters a very different complexion.[14]

This rule of administration comes from Chief Justice Tilghman, of Pennsylvania, who stated:

> For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.[15]

In Thayer's view, this rule is important to prevent the judiciary from destroying democratic governance: "The checking and cutting down of legislative power, by numerous detailed prohibitions in the Constitution cannot be accomplished without making the government petty and incompetent."[16] Thayer rejects the view that the courts must safeguard people's rights; he did not think that the courts were capable of the task: "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."[17]

Mendelson suggests that Thayer's viewpoint provided the intellectual framework for generations of Supreme Court Justices ranging from Oliver Wendell Holmes at the turn of the century to Felix Frankfurter, who retired in 1962: "just as Holmes and Brandeis added something to Thayerism, so did Frankfurter in the McNabb-Mallory doctrine."[18] Mendelson describes this doctrine as Frankfurter's belief that it was better to:

avoid constitutional judgment by turning decisions upon

> its supervisory control over to the lower federal courts. Such decisions, because they do not rest upon the Constitution, are subject to congressional control. They thus escape the antidemocratic element that Frankfurter found in judicial review.[19]

Writing in 1978, Mendelson feared that with Frankfurter's retirement, the restraining influence of Thayer and his disciples had vanished from the Supreme Court. He comments:

> For sixty years, from 1902 until 1962, at least one and for a time two of the "Harvard judges" were on the Supreme Court. In all those years their influence was far out of proportion to their numbers. With the coming of the hysterical 1960's--about the time of Frankfurter's retirement--almost all they had stood for vanished. Perhaps not quite all, for no activist, modern or vintage, has ever admitted that he is an activist. Quite to the contrary, no matter how great the judicial leap, its authors always insist that it derives from some constitutionally appropriate (if previously invisible) source and that it really is not an innovation anyway.[20]

Despairing as his view of the Court's direction in 1978 is, Mendelson overstates the dominance of judicial activism on the Court. The Thayer tradition was far from dead even in the 1970's. William Rehnquist was appointed to the bench in 1971 by Richard Nixon, seeking to fulfill his promise to appoint "strict constructionists." Rehnquist certainly did not disappoint Nixon.[21] In his attack on abuse of "The Notion of a Living Constitution," William Rehnquist begins by observing that "the phrase "living Constitution" has about it a teasing imprecision that makes it a coat of many colors."[22] Rehnquist suggests that the metaphor in fact has two resonances; he approves of the first:

> The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live . . . Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct.[23]

Put another way, Rehnquist suggests that the Constitution is a living document in the sense that interpretations of it must not simply be confined to objects, activities, and ideas that existed at the time of the Constitutional Convention. The general language of the Constitution on Freedom of Speech, for example, can be adapted and applied to the invention of television and radio.

Rehnquist, however, indicates disapproval of and is very cautious about the more activist notion that because the Constitution is a living document its meaning can be shifted as a given situation seems to warrant. Rehnquist explains:

> I have sensed a second connotation of the phrase "living Constitution." Embodied in its most naked form, it recently came to my attention in some language from a brief that had been filed on behalf of state prisoners asserting that the conditions of their confinement offended the United States Constitution.
>
> > We are asking a great deal of the Court because other branches of the government have abdicated their responsibility . . . Prisoners are like other "discrete and insular" minorities for whom the Court must spread its protective umbrella because no other branch of government will do so . . . This Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of

the United States and will not be tolerated.[24]

In considering this brief, Rehnquist points out:

> Here we have a living Constitution with a vengeance. Although the substitution of some other set of values for those which may be derived from the language and intent of the framers is not urged in so many words, that is surely the thrust of the message. Under this brief writer's version of the living Constitution, nonelected members of the federal judiciary may address themselves to a social problem simply because other branches have failed to do so. These same judges, responsible to no constituency whatever, are nonetheless acclaimed as "the voice and conscience of contemporary society."[25]

For Rehnquist, this vision of the federal judiciary would turn judges into a "small group of fortunately-situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country."[26] Rehnquist finds three flaws with this view:

> First it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, the brief writer's version ignores the Supreme Court's disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer's version, advancing them through a free-wheeling federal judiciary is quite unacceptable in a democratic society.[27]

Indeed, Rehnquist feels that "The brief writer's version of the living Constitution, in the last analysis, is a formula for an end run around popular government."[28] Like Thayer and Stewart, Rehnquist fears that a judiciary wielding the "living Constitution" metaphor as a weapon against legislative action

it dislikes will destroy the popular government the Constitution was established to protect.

Mendelson is right in concluding, however, that by the 1960's judicial activism was in control of the Court. William Douglas, William Brennan, Abe Fortas, and Chief Justice Earl Warren formed the working majority for the activist Warren Court. The Warren Court, however, gave way to the Burger Court which moved more to the center in the 1970's. Nevertheless, the Burger Court continued to hand down many decisions that smacked of judicial activism.

Judicial activism is often characterized as "legislating from the bench." An activist seeks a quasi-legislative role by employing the Constitution as a judicial veto over legislative action. An activist judge does not leave the political process and its democratic vagaries to rectify legislation he or she finds silly, unwise, or threatening to the rights of citizens. Instead, an activist judge declares the given legislation to be unconstitutional.

Because only a limited number of conceivable legislative actions are explicitly forbidden by the Constitution, an activist judge infers rights as diverse as a right to privacy and a right to liberty of contract from "reading between the lines" of the freedoms that are explicitly granted. The interpretive gyrations sometimes required to discover such implied rights are instructive about the limited value that

activists place on the literal text of the Constitution. Calling the Constitution a "living document," activists seem to stretch it in some cases to fit the demands of a particular case.

As for historical framework, activists will sometimes construe portions of the Constitution with little or no regard for either the intent of the framers or the previous decisions of the Court. For example, Justice Douglas' opinion in Griswold v. Connecticut that employed the Ninth Amendment to limit the states flew in the face of both the intent of the framers, to limit the federal government in favor of the states, and of nearly two centuries of judicial opinions.In a 1972 book Taking Rights Seriously, Ronald Dworkin suggests a qualified justification for judicial activism. Speaking of the Nixon Administration's disdain for the Warren Court, Dworkin remarks on the example of Brown v. Board of Education of Topeka Kansas:[29]

> The Constitution's guarantee of "equal protection of the laws," it is true, does not in plain words determine that "separate but equal" school facilities are unconstitutional, or that segregation was so unjust that heroic measures are required to undo its effects. But neither does it provide that as a matter of constitutional law the Court was wrong to reach these conclusions. It leaves these issues to the Court's judgement, and the Court would have made law just as much if it had, for example, refused to hold [segregation] unconstitutional.[30]

Dworkin argues that, in fact, an overly narrow reading of the Constitution will pervert, not preserve the clear meaning of

the text. He observes: "The text of the First Amendment, for example, says that Congress shall make no law abridging the freedom of speech, but a narrow view of individual rights would permit many such laws."[31]

Much of the legacy of judicial activism, however, had sprung not from abstract academic discussions of the freedom of speech, but from Justice Stone's [in]famous "Footnote 4" in his majority opinion from United States v. Carolene Products Company.[32] In an "otherwise unremarkable case,"[33] Stone injected a fascinating footnote stating:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny.

In this pedestrian case, Justice Stone opened a Pandora's box of interpretive issues by suggesting that certain freedoms might be deserving of heightened judicial scrutiny. Thus, in order to protect certain preferred freedoms, judges can submit otherwise valid legislative acts to more searching scrutiny than would otherwise be the case. For example, the Warren Court regularly subjected racial classification by the state to a "compelling state interest" test that required the state to show a compelling interest in the classification and that there was no alternative means to achieve the compelling state interest.[34]

A Harvard Law School Professor of a very different

ideological bent from Thayer, Laurence H. Tribe, exemplifies the way that activists use the preferred freedoms doctrine in his testimony to the United States Senate on a bill that would have defined human life, thereby doing what the Supreme Court refused to do in Roe v. Wade. Tribe treats the right to privacy in general and the right to an abortion in particular as a preferred freedom, so much so that he suggests that the judiciary must sharply constrain legislative action. Tribe tells the Senate Subcommittee on Separation of Powers that:

> Congress is empowered only to make laws, not to lobby or to advise the Courts. And if a law made by Congress can redefine terms in one area so as to entrust to majority vote or other governmental determination a matter that the Supreme Court has held individual women entitled to decide for themselves, then Congress has equal power to effectuate such a divestment of personal rights in other areas as well---regardless of the Supreme Court's degree of confidence or perplexity.

> The only way to avoid that radical and profoundly threatening conclusion is to insist that any Act of Congress, even if that Act constitutes otherwise "appropriate legislation," be subjected to judicial review for its consistency with the liberties secured by the Bill of Rights, under criteria no less demanding than those under which state legislation of similar effect would be scrutinized.[35]

Tribe asserts that Congress has no more power than a state legislature does to pass legislation that contradicts a Supreme Court ruling on a particular preferred freedom. Using this logic, after Lochner v. New York, discussed elsewhere in this paper, the Congress would have had virtually no power to pass any law that contradicted liberty of contract, such as minimum wage or maximum work hour laws. Tribe seems to hint that the constitutional order places Congress in a subordinate position to the courts.

The activist tone of Tribe's statement is apparent in his insistence that the Congress defer to the courts, not vice versa. While judges, even when they are rendering activist decisions, deny that they are subordinating the legislative branch to the judicial, Tribe is forthright in doing exactly that. For certain preferred freedoms, which for Tribe seems to include privacy, the Constitution is not only what the Court says it is, the Court can exercise judicial prior censorship over congressional action that may disagree with a ruling by the Court.

This is not to say that Congress should openly flout

Supreme Court rulings with regularity. Rather, Congress should not be restrained from legislating at all in an area that the Court announces is constitutionally protected. Because the Court chose to constitutionally protect abortion, claiming that it could not determine when life began, does not automatically preclude Congress from expressing the people's will on the matter.

In effect, Tribe sees the Court as a way of moving issues out of the public forum. Preferred freedoms, for Tribe, should be protected by stringent judicial scrutiny of any laws that might infringe on those freedoms, even though these freedoms cannot be found in the text of the Constitution. Nine justices are thus empowered to determine what is and is not a preferred freedom and to eviscerate legislative action accordingly. Distrusting the popular will, Tribe sees the courts as the ultimate guardians of preferred freedoms. This raises the question of whether or not the Constitution contain freedoms not explicitly listed or even implied?

In suggesting that the Constitution meant for judges to have discretion in interpreting Constitutional freedoms, Justice Goldberg asserts that the Constitution allows judges to both prioritize and create rights. Goldberg remarks in Griswold v. Connecticut[36] that: "the concept of liberty protects those rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." Thus,

the vague notion of liberty allows tremendous judicial discretion in operationalizing liberty in terms of specific rights.

In his dissent to San Antonio v. Rodriguez (1973),[37] Justice Marshall suggests a sweeping mandate for judicial creation of "unlisted fundamental rights."[38] Marshall explains:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent upon interests not mentioned in the Constitution. As the nexus between the specific Constitutional guarantee and the nonconstitutional interest draw closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny available . . . must be adjusted accordingly.[39]

Marshall seems to be suggesting that nonconstitutional interests can, at times, outweigh the text of the Constitution in deciding whether or not legislative action requires judicial scrutiny.

My concern with Marshall's view can be explained in terms of my views on Marshall's theory that the death penalty is unconstitutional as a violation of the Eighth Amendments guarantee against cruel and unusual punishment. For Marshall, society's "evolving standards of decency" that forbid capital punishment offer more effective guidance for the courts explicit constitutional language to the contrary.[40] I oppose the death penalty, thinking it to be unwise penology and unwise public policy. I find the death penalty morally

offensive. Unhappily for my chances of agreeing with Marshall, however, capital punishment is mentioned three times in the text itself with implied approval. Amendment V to the Constitution provides that: "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall any person for the same offense be twice put in jeopardy of life or limb." If people can be held to answer for a capital crime, a capital crime being a crime punishable by death, then clearly they can be executed. It is also difficult to imagine what being put in jeopardy of life might mean if not capital punishment. Similarly, the due process clause of the Fifth Amendment and a similar clause in the Fourteenth Amendment provide that "no person shall be . . . deprived of life . . . without due process of law." Article III Section 3 states "Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." In the Eighteenth Century, an arrest for treason under an Attainder of Treason invariably meant execution ("corruption of blood" refers to the practice of punishing a traitor's family or decedents for his or her treason). In Article I, Section 8, Congress is given power "To define and punish Piracies and Felonies committed on the high Seas, and Offence against the Laws of Nations." One of the eighteenth century laws of nations was that piracy was

punishable by hanging.

Given the fairly explicit constitutional approval of capital punishment, it is difficult for me to feel it is unconstitutional. Capital punishment is unwise certainly, immoral perhaps, but not unconstitutional. Asserting otherwise is to substitute personal beliefs for the language of the Constitution.

While Marshall may have provided a compelling example of judicial activism for me, he is not commonly thought of as the greatest judicial activist. Typically, political scientists and legal scholars point to William Douglas as the great judicial activist. Douglas, however, was neither the first nor the last judicial activist. He may well have been the most prolific. To exemplify judicial activism, I shall examine three activist decisions, which variously created or affirmed rights to liberty of contract and privacy. Lochner v. New York was the touchstone of modern judicial activism, though its conservative ideology of laissez faire economics may have been anathema to the Warren Court's social liberals. Griswold v. New York, despite Justice Douglas' protestations to the contrary, resurrected Lochner and created a right to privacy. Roe v. Wade drew on Griswold's reasoning and used the right to privacy to place the individual's right to privacy above even the state's interest in protecting unborn children.

In 1905, the Supreme Court reached its nadir of creating a right to economic due process in Lochner v. New York. This decision indicates that liberals hardly have a monopoly on judicial activism; in Lochner the Court furthered its project of laissez faire economics with a sweeping disregard for the constitutional text. The judicial activism here took the form of establishing national economic policy through the courts.

In Griswold v. Connecticut, Justice Douglas revived the hoary notion of substantive due process, this time with regard to a right of privacy, as opposed to an unfettered right to contract. Griswold overturned a Connecticut statute forbidding birth control, effectively creating a "private matter" doctrine that effectively barred given areas of life from governmental interference, just as the "political questions" doctrine had placed certain legal questions outside the purview of the courts.

Justice Blackmun's opinion in Roe v. Wade stemmed from Griswold's notion of privacy. Taking Griswold to its logical extreme, Justice Blackmun placed the question of abortion outside the realm of public policy and into the sanctum of privacy. While Griswold overturned a law that was seldom enforced in an area increasingly decriminalized, Roe overturned, to one degree or another, the laws of thirty-eight of the fifty states of the union.

The notion of preferred freedoms is not unique to the

recent epoch. At the turn of the century the preferred freedom was economic freedom, generally expressed in terms of "liberty of contract." The turn of the century Court viewed the Fourteenth Amendment as incorporating natural rights notions of property, translated by the Court of the late Industrial Revolution to mean a right to liberty of contract. The Court viewed the Fourteenth Amendment's guarantee of due process of the laws as a guarantee against state infringement on the Court's notions of economic theory. In effect, the Court's notion of "substantive due process" enshrined Adam's Smith's notion of Laissez Faire economics in the United States Constitution in general and the due process clause of the Fourteenth Amendment in particular.

In Lochner v. New York[41] the Supreme Court struck down a New York law setting a maximum 60 hour work week and 10 hour work day for bakers. Justice Peckham reasoned, for the Court, that these restrictions on the hours of labor for bakers violated both the bakers' and their employers' liberty of contract.

Peckham opens his opinion with a sweeping assertion of a right to liberty of contract stemming from the Fourteenth Amendment. Peckham remarked: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the federal Constitution."[42] While admitting that the state had the right

under its police powers to make reasonable limitations on liberty, including economic liberty, Peckham denied that the law setting maximum hours for bakers to work was reasonable.

Peckham flatly asserts: "There is no reasonable ground for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[43] Indeed, Peckham so narrowly defines "reasonable" exercise of the state police power in economic matters that it is difficult to conceive of an economic regulation that would pass his constitutional muster. Peckham suggests that the only possible relevance a law limiting bakers' hours could have to a legitimate exercise of the state's police powers is in terms of public health. He finds, however, that no matter of public health is involved.

The case is framed as a balancing test between "the power of the state to legislate and the right of the individual to liberty of person and freedom of contract."[44] Given the near sacral view the Court took of economic freedom, the balancing was in fact tilted strongly towards individual economic freedom. In a somewhat strained justification for striking down the New York law, Peckham asserts:

> We think the limit of the police power has been reached and passed in this case. There is, in our judgement, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are

> following the trade of a baker. If this statute be valid . . . there would seem to be no length to which legislation of this nature might not go.[45]

The Court's opinion is activism of the most sweeping sort. It strikes down a seemingly innocuous and potentially benign legislative action claiming to guard against a barrage of laws that might interfere with the liberty the Court finds most sacred, economic liberty. The discrete piece of legislation is sacrificed on the altar of fearful generalizations about future legislation that might spring from New York's humble beginning. The Court essentially privileges its own "laissez faire" economic agenda over the will of the people as expressed by the legislature. Further, the sweeping view that the decision takes of economic freedom seems to enjoin states from a wide variety of economic regulation, thereby eviscerating the state police power.

In a sharp dissent, Justice Holmes remarks bluntly: "This case is decided upon an economic theory that a large percentage of the country does not entertain."[46] For Holmes, deciding a case on the basis of a privileged economic theory is wrongheaded; he states: "a Constitution is not intended to embody a particular economic theory."[47] Suggesting deference to legislative will, Holmes observes that "state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like, as tyrannical."[48] Holmes adds, "General propositions do

not decide concrete cases,"[49] suggesting that the Court has erred in attempting to apply a broad economic theory to the particular case.

Specifically addressing the majority's Fourteenth Amendment anchor for its views, Holmes remarks:

> I think that the word "liberty" in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[50]

While Holmes could be fierce in defense of freedoms, particularly speech, he does not view unfettered liberty of contract as a constitutionally protected freedom. Here Holmes adopts Crosskey's literalist perspective and argues for a reading that simply considers the text of the Constitution, not the Court's own views on the wisdom or utility of a particular law. Clearly, Crosskey's choice of Holmes' to adorn the leaf of his work is not an accidental one.

In Griswold v. Connecticut,[51] Justice Douglas creates his own preferred freedom, privacy, from the intersection of several parts of the Constitution. In Griswold, Douglas ruled that a Connecticut Statute outlawing the sale or use of contraceptives was unconstitutional. Douglas argued that, while the law did not violate any particular section of the Constitution, it violated the "zones of privacy" created by the "penumbras" of the Bill of Rights and the Fourteenth

Amendment. Douglas explained:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[52]

Douglas clearly accepts the notion that the Fourteenth Amendment incorporates the Bill of Rights in its guarantee that "nor shall any state deprive any person of life, liberty, or property, without due process of law." That is, Douglas views the Fourteenth Amendment as incorporating the first Eight Amendments in certain cases, as in his protection of the right of privacy.

Douglas first assumes that the Fourteenth Amendment incorporates the First Eight Amendments, in and of itself quite a judicial leap. He next argues that rights can be created in the intersection of these amendments, in what is implied by linking them together. Finally, Douglas claims that the Ninth Amendment cinches his argument for a right of privacy, by suggesting that there are other rights not enumerated in the Constitution. Douglas' somewhat convoluted reasoning suggests his determination to strike down a law he

considers unwise.

Interestingly, the Ninth Amendment has virtually never been addressed by the Supreme Court, because the Court has traditionally refused to see itself as the guarantor of the other rights not enumerated by the Bill of Rights. This historically is a matter for legislative, not judicial action. In a blatant act of judicial activism, of legislating from the bench, Douglas takes it upon himself to define what these other rights might be.

Oddly, as he does so, Douglas denies that he is following the precedent of Lochner, which seemed to give the Court the authority to create rights not explicitly mentioned or even hinted at in the Constitution. Douglas remarks:

> Overtones of some arguments suggest that Lochner v. New York should be our guide. But we decline that invitation as we did in West Coast Hotel Co. v. Parrish. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.[53]

If Douglas does not claim to be a superlegislator in all areas, he is certainly establishing himself as one, in at least the negative sense, in the area of sexual conduct between married adults. The state, by Douglas' logic, is utterly forbidden to interfere in the "intimate relation of a husband and wife."[54] Placing this area entirely off-limits to legislative action and creating a right to privacy that the state may not invade certainly appears to be usurping the role

of legislator.

Justice Black, in his dissent, suggests that the is exceeding the interpretive authority of a Justice and usurping the role of legislator. Black begins by stating flatly: "I do not to any extent base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one."[55] For Black, the Court's role is only to decide the constitutionality of the law, not, as Douglas does, to debate its wisdom. Here Black echoes Holmes' dissent from Lochner in rejecting a role for the Court as superlegislature.

Black then rejects the interpretive leap that Douglas makes in asserting a constitutional right to privacy. Black states:

> The Court talks about a constitutional "right to privacy" as though there were some constitutional provision or provisions forbidding any law to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities.[56]

There is, in Black's eyes, no general right to privacy. The great textual literalist of twentieth century jurisprudence, Black argues that the right to privacy exists only in the certain situations explicitly mentioned in the Constitution. Recognizing Douglas' deviation from the text, Black observes that "One of the most effective ways of diluting or expanding

a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words more or less flexible and more or less restricted in meaning."[57] This is what Douglas has done by inserting privacy into the Constitution; he has added a word that is considerably more flexible in meaning than those typically employed in the Bill of Rights.

In rejecting the insertion of privacy into the Constitution, Black rejects the implicit "living Constitution" approach that Douglas takes. The living constitution metaphor, as previously mentioned, assumes that the Constitution can be evolved to fit changing circumstances and social predilections, no matter how far removed from the original text. Black remarks:

> I realize that many good and able men have spoken, sometimes in rhapsodical terms, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make these changes. For myself, I must in all deference reject this philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.[58]

Because the Constitution explicitly lays out two methods for the people, through their elected representatives, to change the Constitution as the changing times may require, Black rejects any role for the Court in keeping the Constitution up-

to-date. In his logic, if a change in the Constitution is truly required, the amendment process will surely produce the necessary change.

Clearly the effect of this position is a conservative one. It is much easier to summon a majority of five justices to initiate a change in the Constitution through a Supreme Court ruling than it is to ratify a constitutional amendment. Indeed, for Black, the ease of changing the Constitution through the medium of the Supreme Court is the danger to be avoided. Because it is so easy and so tempting for the Court to write its wisdom of the moment into the Constitution, Black wishes to avoid temptation and deny the Court any role in changing the Constitution. Douglas illustrates the tremendous latitude that a reader can exercise in interpreting a text. Black, on the other hand, seeks to limit interpretation in the same way that Crosskey seeks to, by focusing on the text.

Justice Stewart's dissent reiterates the major points raised by Black. Like Black, Stewart recalls Holmes' caution that the Court must often accept the constitutionality of laws it finds "injudicious, or if you like as tyrannical."[59] Stewart remarks pointedly "I think this is an uncommonly silly law . . . But we are not asked in this case whether we think this law is unwise or even asinine."[60] Rather, Stewart observes, "We are asked to hold that it violates the United States Constitution. And that I cannot do."[61] Stewart notes

that the majority opinion rests simultaneously on six amendments to the Constitution and on none at all; "In the course of its opinion the Court refers to no less than six Amendments to the Constitution . . . [but] does not say which . . . if any, it thinks is infringed by the Connecticut law."[62]

Stewart adds that the ninth amendment argument advanced by the majority is unfounded in precedent and blatantly misconstrues the intent of the Framers. He remarks:

> [T]o say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, . . . was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers . . . Until today no member of this court has ever suggested that the Ninth Amendment meant anything else.[63]

In other words, the Ninth Amendment was to limit the federal government, to keep it from infringing on rights that might be granted by the states. The Ninth Amendment was never construed to allow the federal judiciary to confer power on itself to limit the states.

In an eerie anticipation of the position the Court would eventually adopt on obscenity,[64] Stewart rejects the idea of a Constitution that adjusts to changing community standards. Seeming to recognize the impractibility of the Supreme Court acting as a national arbiter of community standards, Stewart observes that:

> At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." . . . If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take the law off the books.[65]

While Black suggested the Amendment process as the way to rectify shortcomings in the Constitution exposed or created by the passage of time, Stewart suggests that the political process is the way to rectify deficiencies in the law. Admitting that the Connecticut law is a silly one, Stewart argues that responsibility rests with the citizens of Connecticut, not the Supreme Court of the United States, to correct the folly of their legislature. Griswold raises no constitutional question at all for Stewart, save the majority's flouting of the document's meaning. Rather, Griswold highlights that the political process is usually the only constitutional remedy to a perceived evil that is not specifically addressed in the Constitution.

Much as Douglas may resist the comparison, if Black and Stewart are replaying Holmes' role in Lochner, his majority opinion echoes Peckham's. Douglas' argument that the Connecticut law is unconstitutional is unconvincing; like Peckham Douglas is carving out a freedom from the murky

language of the Fourteenth Amendment's reference to "due process." Douglas goes a step further in his interpretive leaping to the result, but his decision in Griswold has the same effect as Peckham's in Lochner; both give the Supreme Court a veto over legislative action in areas where the Court, not the Constitution, forbid legislators to tread.

While it is perhaps tempting to dismiss activism in one smug literalist gesture, some of the most heartily approved and timely Supreme Court decisions have resulted from at least a modified activist approach. In Brown v. Board of Education of Topeka Kansas, in striking down segregation in the public schools, Chief Justice Warren refused to consider either precedent, Plessy v. Ferguson, which allowed "separate but equal" public facilities, or the intent of the framers of the Fourteenth Amendment, which did not seem to encompass eliminating single sex education. Warren commented:

> In approaching this problem, we cannot turn back the clock to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[66]

While the result of the case is salutary and hardly questioned by any but the most determined racist in today's public discourse, Warren's reasoning is striking in the way it flouts the questions of both precedent and authorial intent.

Warren evokes the "Living Constitution" metaphor in claiming that the Court cannot turn back the clock to determine the intent of the Framers, an odd decision given that this had been the focus of reargument before the Court. The Court is on firmer ground on overruling Plessy; the doctrine of stare decisis does not mandate that the Supreme Court must slavishly follow precedent; it must only respect precedent. If Plessy was considered a dangerously wrongheaded precedent than the Court was perfectly justified in overruling it. Nevertheless, the Court should not wantonly overrule precedent at the slightest provocation. Political philosophy from the time of Aristotle has taught that respect for the law grows through tradition and that each change in the law must be considered in terms of the good the change will accomplish versus the harm that will be done to the habit of respect for the law.

Warren's stirring ruling that "We conclude that in the field of public education the doctrine of 'separate but equal' has no place" implies that segregation is an unwise and morally bankrupt, not an unconstitutional public policy.[67] Brown v. Board of Education of Topeka Kansas is instructive in several ways in assessing judicial activism.[68] In the first place, it points out that judicial activism is not always undesirable, at least from the perspective of the good of society. Secondly, Brown suggests that judicial activism, if it is to consider the wisdom and the morality of a law in

addition to the constitutionality, is best served in striking down grievous offenders that do significant harm. Griswold, on the other hand, struck down a law that had only been enforced twice in over a century, with the result of a $100 fine for those convicted of violating it.

Earl Warren was often labeled a "judicial statesman." He deviated from both precedent and the text of the Constitution in certain watershed cases and was praised as a statesman who lead the Court to address critical issues that needed immediate attention. It becomes difficult, however, to distinguish important from unimportant issues once the decision is made to occasionally depart from the constitutional text and the intent of the framers. Activism in Brown v. Board is an extreme example of well-timed activism. Roe v. Wade, which created two decades of social strife, on the other hand, can hardly be considered a "statesmanlike" decision regardless of one's feelings on the abortion issue. Perhaps a corollary, unfortunately, to the rule that occasional judicial activism is necessary is that once started upon, the path to judicial activism is a tempting one.

For example, the Court's logic on a right to privacy did not stop with striking down an archaic and seldom-enforced Connecticut law outlawing contraceptives. In 1973, Justice Blackmun relied on the Griswold precedent to lead the Court

into the divisive issue of abortion. Despite the fact that 38 states restricted abortion to some degree in 1973, and that a right to an abortion in the first trimester of pregnancy had never crossed the minds of the framers, Blackmun ruled in Roe v. Wade[69] that the right to an abortion in the first trimester was constitutionally protected from all state regulation, while abortion in the second trimester was largely protected.

Blackmun applied the stringent "compelling state interest" test to state regulation of abortion. Under this test, the state needs to show a compelling interest in restricting a right, and must show that the resulting statute is substantially related to the state's compelling interest. Blackmun ruled that the compelling state interest lay in protecting the life of a viable fetus. This restricted state regulation of abortion to the third trimester for the most part (because few second trimester fetuses were viable in 1973), and allowed banning abortion completely only in the third trimester. Blackmun finds that the Texas statute is not substantially related to his narrowly drawn conception of the compelling state interest as protecting a viable fetus. He concludes:

> Measured against these standards, the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. the statute makes no distinction between abortions performed early in

> pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.[70]

Blackmun seems to deny that his decision is an example of judicial activism. Much of the language of his opinion seems directed at proving the contrary, that the decision is a restrained one, well within the boundaries of the Constitution. As Mendelson suggests, this is the legacy of Thayer, Holmes, Brandeis, and Frankfurter: even activist judges making activist decisions feel compelled to deny that they are doing so. Blackmun agrees that there is a qualified constitutional right to privacy, but he bases this finding on "a line of decisions, however, going back perhaps as far as Union Pacific Railroad v. Botsford (1891)."[71] What Blackmun has no precedent for, however, is his finding that the right to have an abortion falls under this constitutionally protected zone of privacy.

Blackmun also claims to balance the right of privacy for a women having an abortion against the interests of the state. He so narrowly construes the interests of the state, however, that the decision clearly tilts in favor of a woman's right to have an abortion. If the state has no compelling interest in protecting a fetus in the first two trimesters, and no interest at all in the first trimester, than the right to an abortion is virtually an unqualified one, given that abortions

are typically performed in the first trimester.

Like Douglas in Griswold, Blackmun implies that he rejects the reasoning of Lochner. Blackmun quotes approvingly from Holmes dissent in that case, remarking:

> We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in Lochner v. New York (1905)
>
> > [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[72]

Justice Rehnquist's dissent points out the inconsistency in Blackmun quoting from Holmes' dissent while at the same time carving out a right of as dubious constitutionality as the right to liberty of contract. Rehnquist argues:

> While the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in Lochner and similar cases applying substantive due process standards, . . . adoption of the compelling state interest test will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling."[73]

And so, Rehnquist fears, the Constitution becomes what the Court decides it is.

W.W. Crosskey, on the other hand, had a firm view of what he believed to be the true Constitution. He grounds his view firmly in an extensive analysis of the text, not the vagaries of community standards or preferred freedoms. In doing so,

Crosskey takes aim at exactly the sort of subordination of the constitutional text that is an essential part of the practice of judicial activism.

Chapter 2:

Crosskey's Way of Reading

To Crosskey's mind, the Constitution has been persistently misread throughout the history of the Republic. This, in his view, has led to more power for the presidency, the judiciary, and the individual states, and less for the Congress, than the framers of the document intended. With his close study of the eighteenth century meanings of the words that comprise the Constitution, Crosskey hopes to counter this misreading with irrefutable evidence of the document's true meaning. Crosskey's reading is textual in that in his view all meaning is located in the text; the reader's job is to find the text's true meaning.

The title page of each of Crosskey's three volumes contains a quote from Oliver Wendell Holmes; Holmes' remark explains that members of the Supreme Court:

> ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.[74]

Holmes' view contrasts sharply with the arrogance of Hughes' view that the "Constitution is what judges says it is."[75] Rather than depositing all meaning in the interpreter of the Constitution (specifically judges), Holmes suggests that the jurist must seek to place disputed language in historical context. This act of historicizing shifts the question from

"What does the document me to me today?" to "What did the document mean to the ordinary speaker of English in the time it was written?" In constitutional scholarship, Hughes' remark represents the view of judicial activism, while Crosskey seeks to develop the ultimate goal of a literalist: a true meaning of the Constitution.

Having stated the importance of determining the circumstances in which words are used, Crosskey sets out to compile a specialized dictionary of eighteenth century word usage. Remarking on the lack of information about the original meanings of the words in the Constitution, Crosskey explains that:

> One main purpose of this book is to supply these lacks: to provide the reader, as the discussion proceeds, with a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution; and to that ultimate end, for an understanding of the literature of 1787 and 1788 about it. In building this dictionary, our rule will be to employ in it only materials that are beyond suspicion . . . For, by using such materials, a dictionary can be made which will not, it is conceived, be open to the many natural suspicions that arise from the known or suspected bias of speakers and writers on the Constitution. And in consequence of this, it should lead to constitutional conclusions having a very high and singular cogency.[76]

This dictionary would allow the reader to follow Holmes' injunction to place the document's words in historical context in reading the Constitutional text. With Crosskey's dictionary, the reader has the information available to determine what the words of the Constitution would have meant

to an American in the 1780's. In providing this information, Crosskey seeks to limit the reader's interpretive freedom by grounding the reader's interpretation in and limiting it to his authoritative dictionary.

In compiling this dictionary, Crosskey makes a claim of objectivity. In suggesting that he can avoid the reader's suspicions stemming from "suspected biases" and that he will use only "materials that are beyond suspicion," Crosskey lays a claim for presenting only facts to the reader. This attempt to discover "just the facts" seems to deny that Crosskey has any biases in compiling his dictionary.

Crosskey is clearly not disinterested in providing a lexicographical grounding for his reader and in constraining the independence of interpreters of the text. In fact, Crosskey dedicates his book to Congress, remarking:

> TO THE CONGRESS OF THE UNITED STATES IN THE HOPE THAT IT MAY BE LED TO CLAIM AND EXERCISE FOR THE COMMON GOOD OF THE COUNTRY THE POWERS JUSTLY BELONGING TO IT UNDER THE CONSTITUTION.[77]

Crosskey follows this dedication by asserting that our system of government has grown unnecessarily complex, because of "a great mass of misconceptions," a misreading of the Constitution.[78] He blames this misreading on repeated attempts to subvert the document "to serve some political end".[79] In his analysis, Crosskey seeks to present "a unitary theory of the Constitution, based, in part, upon the

antecedent usage of the words in which the document is cast, and based, for the rest, upon certain legal and political ideas of the period in which the Constitution was written".[80]

Indeed, Crosskey frames his work as a scientifically valid theory of the Constitution, based on his empirical examination of the language and thought of the Constitution. Crosskey remarks of his methodology:

> In this testing process, the book's theory of the Constitution will inevitably become a theory of American Constitutional history. And since, from a scientific point of view, the best and truest theory is that which explains the widest array of facts by rendering them comprehensible as parts of a persistent whole, the constitutional theory of the book will, in the end, be presented to the reader, not only as a way to the amelioration of man of the evils and defects in our present form of government, but as a scientifically tested and proved theory of our constitutional history, from the rise of the pre-Revolutionary controversy with England, in the 1760's, to the present time.[81]

Put another way, Crosskey is attempting to construct what E.D. Hirsch would call a "best reading" of a text, the most valid reading. Having done so, it would logically follow that this most valid reading is the one that should be acted upon in addressing Constitutional questions of public policy.

Crosskey is careful to limit his discussion of the Constitution to the document itself. He suggests that failing to concentrate on the document itself has accounted for the persistent misreading of the Constitution. These misreadings, to Crosskey's mind, are often caused by historians' obsession

with Madison and Madison's writings about the Constitution. This error is most manifest for Crosskey in attempts to incorporate discussions of The Federalist Papers into an interpretation of the Constitution. Crosskey argues:

> Of the Madisonian sources still unmentioned, the most important are Madison's writings in the well known "Federalist Papers." . . . Their purpose was to help the Constitution to adoption in the state of New York. That state, at the time, was one of the most "antifederal" among the thirteen states in the Union; and in light of this fact it is hardly a cause for wonder that the "Federalist Papers," properly understood, are seen to contain much of sophistry; much that is merely distractive; and some things, particularly in the parts that Madison wrote, which come perilously close to falsehood. In addition, it is virtually certain that much of The Federalist was written only to fill up space in the New York "federal" newspapers and thereby to make less obvious the exclusion therefrom of opposing views.[82]

Crosskey rejects the notion that the "Federalist Papers" were central to the discourse that surrounded the ratification of the Constitution. He suggests that: "the fable that [The Federalist] was 'widely copied'-'extensively reprinted by the press of different States'-is repeated by writer after writer, with no apparent notion of the truth."[83]

Crosskey also dismisses as fable the idea of John Marshall "stretching" the Constitution. Rather, Crosskey paints a portrait of Marshall as a lone Federalist voice in a Democrat-Republican wilderness; "In no position to stretch the Constitution, or even to hurl Jovian thunderbolts of orthodoxy at his political opponents in the Presidency and Congress, Marshall's career was, in fact, a long and stubborn rear guard

action in defense of the Constitution".[84] Unfortunately, in Crosskey's view, revisionism, as represented by a Jeffersonian approach to the Constitution, triumphed over Marshall's orthodoxy. Nowhere is this more evident, Crosskey feels, than in the economic powers of Congress, which have been badly fragmented by a wrongheaded dedication to states' rights.

Crosskey begins by examining the Commerce Clause, Article I Section 8, that states "Congress shall have Power to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." Alluding to the common misstatement of this clause as the "Interstate Commerce Clause," Crosskey notes: "The word 'Commerce' is not defined in the clause; the word 'interstate' is not employed in it; and neither is 'interstate' employed, nor 'Commerce' defined, anywhere else in the Constitution."[85] Implicitly, Crosskey casts doubts on a variety of court attempts at defining commerce, ranging from Gibbons v. Ogden[86] where Chief Justice Marshall defined commerce as "that which concerns more states than one," to South Carolina v. Baker,[87] where the court ruled that state issued bearer bonds are commerce.

Crosskey feels that the strongest evidence against reading the Commerce Clause as the Interstate Commerce Clause is the use of the word "among" in giving Congress the power to regulate commerce "among the several states." Among, for Crosskey, clearly does not mean "between." Placing "among" in

its eighteenth century context, Crosskey states:

> Thus, the only other meaning that "among" could conceivably have if the word "States" must be understood in the sense of "territories" is that which the word takes on when used to express location within a group of geographic entities, in a vague, sporadic, or pervasive way. An example of this use, which was common in the eighteenth century, may be found in The [Philadelphia] Pennsylvania Chronicle, of February 23, 1767. In a translation of one of Pierre Charlevoix's letters on New France, Charlevoix is made to say that he was "regaled *among the islands* of rachel with the juice of the Maple." The regalement of Charlevoix, it is needless to observe, was not interinsular in character. The idea expressed in reference to his regalement was, therefore, not one of interlocality; it was one of vague or sporadic location. A second, slightly variant example of this particular use of "among" may be found in The [Philadelphia] Pennsylvania Packet, of October 5, 1785. In a news item on that date, it was reported that there had been a severe hurricane *among the Windward Islands*." in this instance, the location expressed is a location that is all-pervasive; for it is, again, needless to point out that the hurricane blew "within" the several islands of the Windward group, quite as much as it blew "between" them. So, the question naturally suggests itself, why, if this hurricane could be said, as a whole, to occur "among the Windward Islands"; and why, if the regalement of Charlevoix could be said to occur "among the isles of Rachel," the entire domestic commerce of America could not also have been said, both intrastate and interstate, to occur "among the territories of the states and the country.[88]

Having carefully argued that the interstate view of the Commerce Power is incorrect, because it reads "among" in the sense of "between" rather in the vaguer, more inclusive territorial sense, Crosskey strengthens his point by analyzing the word "States."

For Crosskey, the reading of this clause, the linchpin of our system of federal regulation and the concurrent

administrative state, hinges upon the word "states." He argues that:

> The key to the original, true meaning of the clause is some meaning for the neglected word "States," in the clause, which will make the use therein of "among" with "States" natural and idiomatic English. And finding such a meaning for "states" is not a difficult matter. All that is necessary is to give the word its commonest eighteenth-century meaning. And when that is done, the original, true meaning of the Commerce Clause becomes unmistakable.[89]

In Crosskey's view, "states" means the people of the states that collectively form the United States, not the discrete state governments. Crosskey argues that the eighteenth century view of states did not necessarily imply a Balkanization of power among the 13 states; it simply meant that the ultimate power lay with the people. He explains:

> In eighteenth-century America, the word "state," in its political usage, had a number of different senses, much as it has at present. In one of these, the word could mean "the territory of a state"; but as we have seen in the section just finished, this sense is not a possible one in the Commerce Clause if the idiom of our language is to be preserved. In a second sense, in its political usage, "state" could mean "the government of a state"; but this sense, also, is inappropriate in the Commerce Clause, because the governments of the states, in 1787, did not carry on much "Commerce," in the gainful sense in which, it is certain, the word was there employed. There thus remains only the sense of "state" that was commonest in 1787, which also happens to be the sense most appropriate to the subject in which the Commerce Clause deals; the sense, in short, in which "state" meant "*the people* of a state."[90]

Thus, for Crosskey, the Commerce Clause gives Congress a far more sweeping Commerce Power than simply an Interstate Commerce Power. The Commerce Clause gives Congress a

general Commerce Power, to regulate all commerce taking place among the people of the territory of the United States. This, of course, raises the issue of what Commerce is. Is Commerce to be narrowly interpreted as "traffic"? Is it, as Chief Justice Marshall suggested, "intercourse"?[91]

Crosskey asserts that "Commerce" meant the equivalent of "trade" in the eighteenth century. Crosskey observes:

> In most of the senses in which "commerce" was used in the eighteenth century, the word "trade" was also used. The exception was the broadest of the then current uses of "commerce," in which the word covered any or all of the manifold activities that men carry on together.[92]

Crosskey, like Chief Justice Marshall, gives "commerce" a broad definition; if anything, Crosskey's equating "commerce" with "trade" is broader than Marshall's equating "commerce" with "intercourse."

Having established a broad view of "commerce among the states," Crosskey then approaches the interpretation of the phrase "To regulate Commerce." Here again, the construction of "Commerce" must be a broad one, in order for it to make any sense with regulate. Regulate, according to Crosskey, was understood in the most general sense:

> "To regulate," as it was used in the eighteenth century, simply meant "to govern"; and it meant this in a general comprehensive way. This is apparent from many contexts; as, for example, from the title of an act passed by the Georgia legislature, in 1785, "for better *regulating* the town of Savannah, and the hamlets thereof, and for appointing commissioners for *regulating* the town of Sunbury.[93]

If "to regulate" was used in the general sense of "to govern," than "Commerce" must also be broadly construed.

Crosskey concludes that the Commerce Clause grants Congress a sweeping general economic regulatory power. He asserts:

> And so, if "Commerce is given its broadest gainful sense in the Commerce Clause, the power conferred by the clause becomes one "to govern *generally* every species of gainful activity carried on by Americans "with foreign Nations," every species of gainful activity carried on by them "among the several States" of their own country, and every species of gainful activity carried on by them "with the Indian Tribes." And since these categories include all the varieties of "gainful activity" that Americans can carry on, this conclusion means that Congress has a complete, not a fragmentary power "to regulate Commerce."

Crosskey's sweeping view of Congressional power does not come simply from the Commerce Clause. Rather, it comes from an internal coherence that Crosskey sees within the text of the Constitution, all of which points to a general Commercial and Legislative power for Congress.

Indeed, for Crosskey, the Constitution's body serves to give substance to the general, sweeping purposes of the general government announced in the preamble. In a significant footnote, Crosskey explains:

> Thus, even if the Commerce Clause, by itself, were deemed to be ambiguous as between the comprehensive meaning here presented and the interstate meaning which the Supreme Court follows, the comprehensive meaning would still be the only correct one, as will presently be seen, under the rule of resolving ambiguities in the purview of a document so as best to promote the objects, or purposes, which its preamble states.[94]

In other words, as a general rule of textual interpretation, Crosskey holds that the preamble announces the general objectives of the Constitution and that the Articles of the Constitution should be read in terms of fulfilling those objectives. This differs somewhat from the typical judicial view of the Preamble, which has held that the preamble is not legally enforceable.[95]

Crosskey grounds his view of the Preamble on eighteenth century rules of interpretation. He states: "the Preamble . . . was totally inappropriate, under eighteenth century rules, unless a government was intended, having powers fully adequate to the objects which the Preamble covers."[96] The Preamble certainly suggests sweeping objects to be covered by the national government, asserting in stirring language that:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the Common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

To be sure, the Preamble is one of the most nationalist parts of the Constitution. It does not read "We the thirteen independent and sovereign states;" it reads "We the people . . . do ordain and establish this Constitution for the United States of America." Crosskey views the Preamble as a general mandate for a powerful national government and

very limited state governments, because of the nationalist focus, and because of the six purposes given to government established by the Constitution: to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and to Our Posterity. If Crosskey is right, and the government laid out in the Constitution must be equal to these six nearly all-inclusive tasks, then there would seem to be little governing role left for the states.

Indeed, partially because of the Preamble and partially because of the sweeping powers he feels the general government is granted in the Constitution's text, Crosskey takes a narrow view of the states' police power, the cornerstone in building a justification for most state economic regulation. Crosskey views the state police power narrowly, as simply the power to keep order in the state. Discussing the eighteenth century meaning of "police," Crosskey equates it to polity. Crosskey quotes from Emer de Vattel's influential Le Droit des Gens:

> Polity consists in the attention of the prince and magistrates to preserve everything in order. Wise regulation ought to prescribe whatever will best contribute to the public safety, utility, and convenience; and those who have authority in their hands cannot be too attentive to their being observed. By a wise polity, the sovereign accustoms the people to order and obedience, and preserves peace, tranquility, and concord among the citizens.[97]

For Crosskey, more broad ranging matters than public order, such as justice and commerce were not included in the power to police or to regulate a polity. He notes "for Blackstone, also, "justice," like "trade," or "commerce," apparently lay outside the realm of "polity," or "police."[98] While the states were empowered to keep order within their own confines, this by no means entailed power to regulate commerce or trade. This was reserved for the Congress, which had a general power to regulate commerce.

For Crosskey, this view of a general commercial power for Congress becomes irrefutable when the Imports and Export Clause, the Ex-post-facto Clause, and the Contract Clause are considered in relation to one another. Crosskey asserts "Between these three clauses and the Commerce Clause, there is a considerable degree of interdependency of meaning"; this meaning created by the three clauses, particularly the Contract Clause, "points unmistakably to the existence of an intrastate commercial power in Congress."[99] While Crosskey feels that any one of these clauses in Article I Section 10 is enough to hint at an intrastate commercial power, taking them together it is impossible to deny this intrastate commercial power of Congress.

The Imports and Exports Clause states:

> No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for executing it's

> inspection laws: and the net Produce of all Duties and Imposts, laid by any state on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.[100]

Crosskey is absolutely adamant that the words "imports" and "exports" were meant by the framers to refer to goods travelling between states as well as goods coming into or out of the country. More importantly, imports and exports were not to be taxed at any point by states, as opposed to the conventional view expressed by the original package doctrine. This doctrine, first expressed in Brown v. Maryland held that:

> Whenever imported goods become "mixed up with the mass of property in the country," they became subject to the state's taxing power, but . . . as long as the goods remained the property of the importer and in the original form or package, any state tax upon them constituted an unconstitutional interference with the regulation of commerce.[101]

Thus, once removed from the original package, goods from other states could be taxed. Indeed, under the Taney Court, the state power to tax goods from other states was expanded to give states the power to tax goods from other states for internal policing. Further, the Taney Court suggested that the states had a concurrent commerce power, that allowed them to regulate commerce among the states in the absence of federal action in a given aspect of commerce among the states.[102]

Finally, Crosskey emphasizes that any tax revenues

collected by states from imports and exports (sales taxes, excise taxes, for example) are to turned over to the treasury of the United States.[103] He emphasizes that regardless of the justification the states used in levying the tax on goods from other states, the proceeds from such taxes belonged to the federal government.

Crosskey states, regarding the meaning of "imports" in the eighteenth century:

> For example, there is the evidence to be found in many of the "Just Imported" advertisements that appeared, from time to time, in the newspapers of the old American seaport towns. In the North, these advertisements covered not only European and other foreign goods, but such items as "fine" or "Super-fine Maryland Flour," similar grades of "Philadelphia Flour," "Carolina Rice," "Carolina Pork," and other "Imports" from the more southerly states of the Union. In the South, they included . . . such things as "Connecticut Beef" and "Potatoes, Apples, Onions by the bunch and Bushel, Beats, Carrots, and good Cheese, from Rhode-Island."[104]

Thus, the Imports and Exports Clause forbids a state to levy "imposts or duties," "without the consent of Congress," or "except when absolutely necessary for executing it's inspection laws," on any goods entering a state from another state. Even if Congress gives its consent, or if the inspection laws make an impost or duty absolutely necessary, Congress retains authority to regulate such laws.

"Imposts or Duties," meant, according to Crosskey, any form of government levy or taxation on goods, such as a sales tax. Crosskey explains that Connecticut repealed its

excise tax law, realizing that an excise tax was an unconstitutional duty or impost. Crosskey explains:

> As a precedent, this self-denying action by Connecticut establishes clearly that, in the considered judgement of one, at least of the legislatures of the time, the prohibition in the Imports and Exports clause did extend to "duties" *on the retail sale, and the use,* of "imported *articles*"--that is, in the language of the Constitution, to "Duties on Imports" *when consumed or sold.*[105]

While Crosskey stresses that "when absolutely necessary" means "only when absolutely necessary," as far as states levying imposts or duties, he observes that the revenue reverts to the treasury of the United States in any case. Jeffrey[106] observes in his introduction to Volume III that:

> In other words, the states are clearly authorized to levy *only* those imposts or duties which will defray, for example, such costs as inspector's salaries, essential testing equipment, and necessary buildings. The states, however, are not to generate so much as one penny's worth of "revenue" from their duties or imposts. This interpretation is absolutely unavoidable, for the clause continues and expressly provides that "the net Produce of all these Duties and Imposts shall be for the Use of the Treasury of the Untied States." Readers may quite possibly find it a mind-boggling exercise to contemplate the incalculable millions of dollars which, after nearly two centuries of history, the states unquestionably owe he United States Treasury pursuant to this explicit provision of the Constitution.[107]

Crosskey argues that the Imports and Exports Clause was created to curb abuses under the Articles of Confederation. These abuses chiefly concerned imports and exports between states; for example Crosskey singles out New York as a

particularly grievous offender in regulating goods from other states.[108] Crosskey terms the notion, developed by the Supreme Court in Woodruff v. Parham (1868) that the Imports and Exports Clause referred to only foreign commerce, as "about as plainly unfounded as a theory can be."[109]

Crosskey finds The Supreme Court's theory, first stated in Calder v. Bull (1798), that the Ex-post-facto Clause refers only to criminal law to be equally preposterous. He argues at length that the eighteenth century clearly understood the phrase "ex-post-facto" in the general sense of any law applied retroactively. Crosskey remarks that:

> The Ex-post-facto Clause of the tenth section of Article I provides flatly that "no State shall pass any ex post facto Law." In the ninth section of the same article, there is a similar, sweeping provision that applies to Congress. It is thus evident that "ex post facto Laws" whatever-they are, were disapproved by the framers of the Constitution and intended by them to be completely impossible under our system.
>
> Literally, "an ex post facto law" is simply a law that is retrospective.[110]

A legal dictionary of the time illustrates this general meaning of "ex-post-facto"; Crosskey informs his reader that "if any curious American of 1787 had turned to the lawbooks, then, . . . he would have found that Jacob defined the phrase "ex post facto" with complete generality, as . . . "some Thing done after another Thing that was committed before."[111]

For Crosskey, the Supreme Court's view of the Ex-post-facto Clause as applying only to criminal law has allowed the states wide latitude in commercial regulation that they would never have otherwise had. For example, state bankruptcy laws, affecting debts already contracted, have been common. The result has been to favor the debtor over the creditor. Crosskey remarks: "the 'error' of [Calder v. Bull] has nevertheless persisted, and the Ex-post-facto Clauses, at the present day, are completely meaningless, except for a purpose for which they are hardly needed."[112] In other words, while the clause is impotent where it is needed, curbing state commercial regulation, it applies only to criminal law, where it is seldom needed.

Here again, Crosskey's understanding of the state police power as limited is critical to understanding his argument. As previously discussed, Crosskey viewed the state police power narrowly, as simply "maintaining order." Commerce, he emphasized, fell outside the narrow scope of the state police power. Therefore, commercial regulation was the sole province of the Congress of the United States with its general commerce power.

Each constitutional prohibition on the states makes the general commerce power of Congress more clear for Crosskey. The states are forbidden to raise revenue from goods brought into the state from another state, eviscerating states'

revenue capacity and their regulatory authority. The states are forbidden to pass an ex-post facto civil law, effectively eliminating most state commercial regulation. Further, commercial matters in general fall outside of the state police power, leaving the states with little justification for regulating commerce even in the absence of an explicit prohibition against them doing so (and as we have just seen there are such explicit prohibitions). Finally, Crosskey argues that the Contracts Clause provides the concluding piece of evidence that the states have no place in economic regulation and that Congress has a general power to regulate commerce.

Crosskey opens his discussion of the Contracts Clause, which reads "No State shall . . . pass any . . . law impairing the obligation of contracts",[113] by referring to his previous sections, remarking:

> the chief importance of the facts set forth in the preceding chapter . . . consists in the light that is thereby thrown upon another and more important limitation on the powers of the states . . . The limitation is that ordinarily known as the Contracts Clause[114]

The Supreme Court's misreading in this case has been in interpreting the Contracts Clause to apply only to contracts previously formed. Crosskey notes dryly "The clause itself obviously does not say this; but, as in so many other instances of what is known as 'constitutional law,' the fact

is not supposed to matter.:[115]

Crosskey is adamant that the Contracts Clause forbids the states to pass any legislation impairing prospective contracts; he rejects the standard interpretation that the Contracts Clause refers to contracts already formed. He explains that:

> We begin, then, with a certain idea, highly specious in its nature, . . . It is the notion that it is, in the nature of things, quite impossible to "impair the Obligation of [any] Contract" before it is formed, for the reason, so it is said, that, before a contract is put into existence, there is no contractual "Obligation" to "impair." This, of course, is pure juristic metaphysics; and, like most metaphysics, highly misleading. . . This may be seen very readily if we consider the way in which the word "impair" is used in other connections in which no prejudice in favor of an accepted legal doctrine is involved. For example, we may consider what would be meant by a statement that "the invention of the automobile impaired the usefulness of horses." Every rational user of English would certainly understand that, by such a statement, the impairment of the usefulness of *all* horses was meant, which the invention in question affected; not only those in existence when the invention occurred, but those which have come into existence since that time, and those which may come into existence hereafter.[116]

Therefore, in Crosskey's view, the states are constitutionally forbidden to impair the obligation of any contract, already formed or to be formed hereafter. The courts, unhappily, have read the clause as referring to only contracts "previously formed," thereby giving the states far more regulatory latitude than they should have in the area of Commerce. The effect of this is most evident in the

creation of state bankruptcy laws, which offer debtors who declare bankruptcy relief from the obligations they have contractually undertaken.

While the Marshall Court originally suggested that state bankruptcy laws were an unconstitutional impairment of contracts in Sturges v. Crowninshield,[117] beginning in 1827 with Ogden v. Sanders, the Court allowed some state bankruptcy laws. According to Kelly, Harbison, and Belz, "the Court decided, 4 to 3, that a state bankruptcy law discharging both the person of the debtor and his future acquisition of property did not impair the obligation of contracts entered into after the passage of the law."[118]

Having opened the door to state bankruptcy laws, the Court gave states wide latitude to impair the obligation of contracts during the New Deal, claiming that "emergency might empower government to do things which in ordinary times would be unconstitutional."[119] In Home Bldg. and Loan Association v. Blaisdell, the Court ruled that a Minnesota mortgage moratorium law was constitutional because of the economic emergency created by the Great Depression.[120] This gradual, piecemeal expansion of state power to impair contracts illustrates why Crosskey wishes to forbid, as the Constitution suggests, any state impairment of the obligation of contract. As with judicial activism, once an exception is made in an extreme case, exceptions begin to

become the rule.

The larger result of misreading the Constitution, in Crosskey's view, has been to misread the entire structure of the document in terms of specific prohibitions and grants of power. Article I Section 10 is, for Crosskey, a positive grant in a general sense to Congress of exclusive legislative power, not simply a negative prohibition directed at the states, using the narrowest conceivable interpretation of the language. Put another way, Article I is meant to grant Congress an exclusive general Commerce power, thereby acting as both a sweeping grant of power to the general government and a sweeping prohibition against the states.[121]

It is important to note, Crosskey emphasizes, that the Contracts Clause applies only to the states, not to the Congress. There is no companion clause to the Contracts Clause forbidding the general government to impair the obligation of contracts. Jeffrey summarizes Crosskey's argument on this point, suggesting:

> A further significant feature of the Contracts Clause, however, is that a parallel prohibition against the impairment of contractual obligation by the *national* legislature is not contained in the Constitution. in other words, if the states are prohibited from *all retroactive* legislation by the Ex-post-facto Clause, and the states are additionally prohibited form *all prospective* impairments of the obligation of contracts, the conclusion directly follows that Congress has an *exclusive power* over contracts legislation.[122]

In fact, Crosskey concludes from his examination of the Contracts Clause that:

> State power over contracts was deliberately voted down [in the constitutional convention]. And that means that a national intrastate commerce power, and as well, of course, full commercial power in other fields, must have been intended to exist. In short, it is oblique internal evidence of a most cogent kind that the view here taken of the national commerce power, in the earlier pages of this book, is correct.[123]

Reviewing the first two volumes in this introduction to Volume III, Jeffrey explains how Crosskey's belief in the existence of a general power of Congress to regulate commerce animated his entire work. Jeffrey relates:

> Another reason for [beginning with a discussion of the Commerce Power] is the senior author's reaction to the then
> (and still) prevalent "interstate" theory of the meaning of the Commerce Clause, when he first heard it expounded in his student days at law school. In a basic sense, this reaction was the remote origin of the entire project of these volumes. He thought it unreasonable to split up governmental power over the nation's economic order in such a fashion, nor did the phrase "Commerce among the several States" seem apt language for the expression of what modern lawyers mean by "interstate commerce."[124]

Having presented his case for a General Commerce Power, Crosskey reiterates his view of the composition of the document. In his chapter "The Scheme of Draftsmanship of the Constitution," Crosskey outlines his view of the grand sweep of the Constitution. Crosskey generalizes from his discussion of Article II to remark of the whole document:

> The scheme of draftsmanship in the Executive Article is thus seemingly similar to that of the Constitution as a whole, in that it consists of a general proposition followed by an incomplete enumeration of particulars, or things which arguably are particulars, included within the antecedent general expression.[125]

The grants of power to both the legislative and the executive are meant to be general; enumeration is only for purposes of clarification.[126] A general objective of the Constitution, such as to promote the general welfare, is linked with specific grants of power, such as establishing post offices or coining money, to promote the general welfare.

In Crosskey's eyes, the Constitution is not simply a skeletal enumeration of powers; it all means something. Ignoring parts of the Constitution, which for Crosskey happens all too often, distorts that overall meaning. He suggests:

> we shall also find that no pieces of the Constitution will be left over when it is interpreted according to these eighteenth-century rules. Not one word, from the first word of the Preamble to the last word of the purview, will have been rendered meaningless by the conclusions we shall reach. They will, in other words, provide us with a unitary view of the national governing powers that will fit the Constitution as a whole. And this being true, the further conclusion will assuredly follow, that it is a view of those powers which is historically correct.[127]

This historically correct meaning, in Crosskey's eyes, has been lost by two centuries of chipping away at one after another of the general government's powers because of a

mistaken, ahistorical concern with individual states' rights.

Remarking on the framers' original intent to give Congress a general legislative power, quite apart from its enumerated powers, Crosskey illustrates just how sweeping his view of the national government's powers is. Commenting on the Supreme Court's interpretation of "all" in the phrase "all legislative powers herein granted" (Article I Section 1) as "only," Crosskey states:

> So, it can hardly be said that the Supreme Court's reading of "all" as "only," in the introductory words of Article I, has been inconsequential. Obvious and almost childlike as the error is, it has been one of the basic factors which--helped along by politics, it is true--have crippled and very largely destroyed the powers of Congress under the Constitution.[128]

Crosskey believes that Congress' powers are not confined to "only" the powers explicitly granted in Article I Section 8. He comments that:

> there is in the Legislative Article, at the end of the enumeration therein contained, a plain indication that enumeration is not to be regarded as exhaustive. For we are told at the end of it, as we have already noted, that Congress is to have all the additional "law-making" powers "which shall be necessary and proper for carrying into Execution all other Powers vested by the Constitution in the President and the Judiciary; and all "law-making" powers, finally, "which shall be necessary and proper for carrying into Execution all other powers vested by [the] Constitution in the government of the United States as a whole." This last, the reader will at once perceive, has a natural and obvious reference, in the light of the eighteenth century rules, to the powers that resulted to the Government under those rules, from the objects of the

Government, which the preamble states.

In other words, the Necessary and Proper Clause supports Crosskey's argument about a General Legislative Power in General and a General Commercial Power in particular. The Preamble announces general objects to be met by specific provisions of the Constitution, specific provisions of the Constitution grant Congress the power necessary to meet those objects, and the Necessary and Proper Clause reminds the reader that even these explicit grants of power are not exhaustive, Congress has the Sweeping Power to make all laws needed to fulfill the objects announced in the Preamble and to execute the explicit powers it is granted. Thus, by applying the Necessary and Proper Clause to the Preamble of the Constitution, Crosskey shows both the unity of the Constitution's text and his justification for viewing Congress' power in sweeping terms. The enumerated powers in Article I Section 8 are specific manifestations of the Congress' general power; they are not meant to be an exhaustive list.

Given his confidence that he has uncovered the true meaning of the Constitution, Crosskey would clearly reject the assertion that words have no determinate meanings. Crosskey is confident that he can identify the "one true meaning" of a word in a given historical context. Crosskey does not claim to offer a determinate meaning for a given

word in all situations, but he is confident that he can uncover a word's meaning in a particular historical context. His readings are not simply true; they are "historically true." This allows him to claim that since his historical understanding of the words in the Constitutional text is the correct one, then the reading he does of the text that the words form must also be the correct one.

Conservatives, in contemporary American political discourse, often rail about the need to return to the "original intent" of the framers of the Constitution.[129] This of course does not always mean a return to what the text says; oddly the "intent of the framers" usually tends to be exactly what a given politician might be proposing. Crosskey and Jeffrey observe that:

> American political parties and their leaders have sought to drape their merely partisan views in the sheltering mantle of what politicians and sundry other great leaders ritually refer to, in solemn and awestruck phase, as "the intentions of the framers."[130]

In so arguing, conservatives seem to implicitly assume that a return to "original intent" will mean a reduced role for the federal government and more autonomy for the states. Crosskey illustrates convincingly that we should be careful what we wish for, given that we may actually receive it. If anything, his work suggests that a reading stressing "original intent" might drastically tilt the balance of

power in American federalism towards the central government and away from the states.

Jeffrey's introduction to Volume III explains the position Crosskey takes on his historical researches vis-a-vis the Court's decisions that he indicates are historically suspect. The courts have authority to issue decisions regarding specific cases that suggest a view of history, but Crosskey rejects an impoverished view of history that would passively accept the historical interpretation implicit in Court decisions. Jeffrey remarks:

> Nor are courts, having at their disposal the direction of the public force, suddenly to be converted by any amount of historical evidence into "amorphous dummies, unfit receptacles of judicial power." On the other hand, scholars in the fields of legal and constitutional history, should, wherever possible, avoid the overly facile acceptance of history as written by judges, a task which judges perform as ancillary to their appointed task of deciding disputes. This sort of scholarly reliance upon, and too-rapid approval of, "history" which has been carefully confected to shore up a previously reached judgement can only produce what Maitland warningly characterized as "a mixture of legal dogma and legal history," and this, he correctly pointed out, "is in general an unsatisfactory compound." "the lawyer must be orthodox," Maitland observed, "otherwise he is no lawyer; an orthodox history," Maitland believed, was a "contradiction in terms."[131]

Herein lies Crosskey's mission, to offer historical evidence that contradicts legal orthodoxy. He does not suggest that the courts have lacked authority to make decisions contradicting his evidence, rather Crosskey feels that these

decisions have lacked historical legitimacy. He hopes to build a historical case, grounded in the Constitution's text, to allow Congress to reclaim the powers that rightfully belong to it.

Having previously claimed scientific validity for his study, Crosskey feels that he is presenting objective truth, the one true reading of the Constitution. In doing so, Crosskey grounds his own project, Congressional hegemony, particularly regarding national economic policy, on a firm bastion of constitutional legitimacy. In doing so, Crosskey rejects the "Living Constitution" metaphor, which values evolving interpretations of the Constitution over any determinate intent of the framers. In the introduction to the third volume, Jeffrey illustrates the interpretive approach to the law with part of a lecture by Frederick William Maitland:

> Maitland propounded the instance of a lawyer finding on his table a case involving rights of common [law] which sent him to the statue of Merton (1236). "But is it really the law of 1236," Maitland asked, "that he wants to know? No, it is the ultimate result of the interpretation set on the statute by the judges of twenty generations."[132]

While acknowledging the popularity of this viewpoint that privileges the accumulated corpus of interpretation over the original document, Crosskey rejects it. Remarking on Crosskey's first two volumes, Jeffrey suggests:

In one basic sense, the first two volumes offered the

> mirror-image of [Maitland's view] relegating to a distinctly subordinate position what Professor Maitland characterized as 'the interpretations set on [the document] by the judges of twenty generations,' they sent the reader to the Constitution of 1787.[133]

Crosskey realizes that a reading that would aggrandize Congress at the expense of the powerful troika of the executive, the Supreme Court, and the states is hardly an orthodox one. Crosskey is not "preaching to the choir." He is preaching to the sinners, trying to persuade them to come toward the light. This explains his prodigious amount of evidence and research. Crosskey seeks to persuade, to convert the unbelievers to his way of reading the Constitution and all the implications that go along with that particular way of reading. Hence, Crosskey's need to claim truth for the evidence that he presents.

In fact, Crosskey's rhetoric urges a return to a time before the Tower of Babel, when words were understood clearly, when the nation's economic structure was not capriciously fragmented by the states, and when the legal profession possessed an adequate understanding of the true meaning of the Constitution. In this version of the Tower of Babel, Madison is cast as the principal architect of confusion. Crosskey remarks frequently and at length about various abuses perpetrated by Madison on the Constitutional text. For example, in his discussion of the commerce power of the general government, Crosskey refers to "Madison's

well known, but fantastic theory."[134] In his discussion of the Ex-post-facto Clause, it is Madison who, in the 44th Federalist "carefully contriv[es] to distract from the true nature of the Contracts Clause." [135]

Crosskey does not reject the possibility of other readings, but he rejects their claims to legitimacy. While there may be many readings of given texts, there is only one best reading--**his**. Crosskey's theory illustrates what Paul Ricouer terms the "first way" of a philosophy, the belief that since my theory is true all others must be false.[136] In Crosskey's eyes, because his approach to the Constitution is true, all others must be false. This view clearly does not invite discussion, it invites either complete acceptance or abject rejection of Crosskey's theory.

In doing so, however, Crosskey is not simply taking an egocentric view of the Constitution which denies the possibility that others have something to say about the document. Rather, Crosskey sees himself as he portrayed Justice Marshall, "fighting a stubborn rearguard action in defense of the Constitution."[137]

Crosskey sees others, particularly Madison, as trying to turn the Constitution into a negative list of "don'ts" rather than a positive grant of power for the good of the nation. In concluding the first volume with a discussion of how the tenth amendment strengthens instead of weakens the

general government's power, Crosskey suggests that:

> The Constitution itself, which, we have seen, handed over to the new national government, its courts and its legislature, every aspect of the relations between state and state, was made "the Supreme Law of the Land"; and along with it, the international acts, or treaties, of the new government, and likewise its intranational acts, or legislation were given a "supreme-Law" status, too. So, the international, interstate, and intrastate phases of the pre-existing state "sovereignties" were all conveyed to the nation, by the Supremacy Clause, in the most unmistakable terms. And that the subordination of the states to the nation was intended to be general was made, moreover, perfectly plain, by the further express provision in the clause that the Constitution, statutes, and treaties, of the United States were to be "supreme" over "any Thing in the Constitution or Laws of any State." It is not easy to see how words could have been selected, that would have made all this more sweeping or clear.[138]

In illustrating the integrity of the Constitution's text as a coherent document, not simply an amalgamation of disparate articles, Crosskey highlights the framers' vision of national government empowered to act for the good of the nation. These grants of power to the general government are carefully developed responses by the framers to the concerns that prompted the Constitutional convention in the first place. The framers' genius, for Crosskey, lies in the coherent argument they develop in the Constitution, an argument specifically aimed at their contemporary concerns. The tragedy of constitutional scholarship, in Crosskey's eyes, is its sacrifice of this coherence on the altar of expediency.

The Living Constitution metaphor understates the genius of the Constitution in Crosskey's eyes. The metaphor suggests that the document is simply an outline from which we are free to depart at any time. It is a blank check to change the Constitution from the judicial bench whenever the Supreme Court can muster a majority of five votes. Crosskey, on the other hand, suggests that any change to the original intent of the framers could potentially undermine the meaning of the document as a whole. The framers therefore allowed for amending the Constitution only through the difficult process described in Article V. The judiciary was to have no role in changing the Constitution through de facto rewrites form the bench. Therefore, for Crosskey, careful, literal reading of the Constitution is needed to wipe away the debris of two centuries of wrongheaded and misbegotten interpretation and restore constitutional scholarship to the time when the document meant something.

Like Crosskey, John Rohr seeks to examine the Constitution to legitimate his own area of interest, the administrative state and its attendant bureaucracy. In doing so, Rohr also relies on the text of the Constitution. He adds, however, an element Crosskey was far more cautious about: a discussion of the "Intent of the Framers." Rohr's approach to reading the Constitution is far more typical than Crosskey's literalist insistence on the text and only

the text. Rohr writes within the Constitutional tradition, that views the work of the Federalists and the Antifederalists as a "founding argument" for the Constitution. This tradition also considers the Constitution through the lens of two centuries of court cases that have interpreted the Constitution. Rohr's work illustrates the approach that some in public administration are taking towards the Constitution, a view that values the text but does not focus exclusively on the text.

Rohr's constitutional legitimation of public administration is an influential work in helping to lead administrators to incorporate the Constitution into their work and in legitimating the administrative state. I hope to illustrate how Rohr's way of reading helps him to make his argument and to suggest that a study of ways of reading the Constitution can clarify Rohr's work by examining the way of reading he uses to constitutionally legitimate public administration. Public administration is not mentioned in the Constitution, so public administration is constitutionally legitimate according to what approach to reading?

Chapter 4

Rohr's Way of Reading

In To Run A Constitution, John Rohr explains the way that he reads the Constitution. He quotes Milton's opening of Paradise Lost where the blind poet sought to "justify the ways of God to man" in rewriting Genesis. Rohr explains that:

> My prosaic charge was merely to justify the ways of the Constitution to those who make it work--to those who "run a constitution." Although the predispositions of the Public Administration community simplified this task, there were several difficult choices to be made on how to go about it. Chief among these was the decision to emphasize the constitutional tradition rather than the text of the Constitution.[139]

Rohr implies that a reading coming from the Constitutional tradition will be different from a reading based on Crosskey's approach of concentrating only on the text. Clearly, in Rohr's view, all meaning is not deposited in the text, leaving the reader to uncover the one true meaning of the Constitution. Rather, for Rohr, meaning has been developed through two centuries of constitutional hermeneutics that examine not only the words of the text but also the intent of the Framers.

Hermeneutics has a general meaning in English of an act of interpretation, but for professional literary critics hermeneutics refers to:

> the theory of interpretation, concerned with the general problem of understanding the meaning of texts. Originally applied to the principles of exegesis in theology, the term has been extended since the nineteenth century to cover broader questions in philosophy and criticism, . . . In this tradition, the question of interpretation is posed in terms of the hermeneutic circle, and involves basic problems such as the possibility of establishing a determinate meaning in a text, the role of the author's intention, the historical relativity of meanings, and the status of the reader's interpretation to a text's meanings.[140]

Of this definition of hermeneutics, Rohr clearly focuses on the authors' intention, a difficult matter giving the complicated matter of unpacking the collective authorship of the American Constitution.

In distinguishing between the constitutional tradition and a textual reading, Rohr defines textual scholarship in terms of Crosskey's approach of compiling the lexicography of the text. Rohr implicitly contrasts Crosskey's scholarship with a hermeneutical approach, suggesting that textual scholarship has the more narrow, positivist goal of finding objective truth in the text rather than in the text interpreted through the lens of the intent of the framers.

Rohr distances himself, however, from those who would ignore both the text and the intent of its authors in seeking to impose their own interpretation on the Constitution. Rohr points to Crosskey's work as a "mighty bulwark against an intemperate use of the "living constitution metaphor," adding that:

> This includes justices of the Supreme Court, for it was from a member of that august bench that we heard the startling comment that the Constitution means what the Supreme Court says it means. Such judicial hauteur makes Crosskey's sophisticated linguistic inquiries quite attractive".[141]

In other words, Rohr paints Chief Justice Hughes as a reader run amok, creating meaning completely independently of the text.[142] This contrasts with both Crosskey's textually grounded reading, and with his own work in the Constitutional tradition, where his reading is presumably constrained by previous work in the same tradition, the expressed intent of the Framers, and the by the text itself. Rohr seems very cautious about Hughes' underlying notion that the Constitution's meaning may shift with time; Rohr asserts the value of Crosskey's sort of scholarship as a counterweight to outrageous or extreme interpretations.

It is important to note that Rohr defines constitutional tradition somewhat narrowly as the tradition of scholarship and jurisprudence that has interpreted the Constitution according to the intent of the framers. This allows for more than simply the text to be used in interpreting the Constitution, but it does not allow for the unrestrained reading practiced by judicial activists. Rohr begins his own work by defining both the purpose and the audience for his narrative, with the primary intended audience, public administrators, springing from his

professed purpose: to legitimate the administrative state using the Constitution. Rohr is quite aware of both the story that he seeks to tell and the audience he intends to tell that story to, explaining that:

> The purpose of this book is to legitimate the administrative state in terms of Constitutional principle. It is intended for two groups of readers: public administrators themselves and interested Americans who are the beneficiaries, victims, citizens, and authors of the administrative state. It contributes to a growing body of literature that defends the integrity of the Public Administration as an institution of government.[143]

Here, as is the case when he identifies himself with the Constitutional tradition, Rohr is careful to link his own work with a broader tradition. In this case the broader tradition is the literature in public administration that is concerned with affirming both the legitimacy and the efficacy of the bureaucracy in the face of the "bureaucrat bashing" of the Carter and Reagan administrations in the late 1970's and 1980's. In a sense, Rohr is deriving some of his authority from this larger community of scholarship, by emphasizing that he is not working in isolation and is part of a broader and generally like-minded community.

Rohr is not unaware of the limitations inherent in this definition of his audience; he reflects in his conclusion that "In addressing my argument to the Public Administration community, I was preaching to the choir".[144] Rohr suggests that his argument is made easier by an audience that should

be receptive to what he has to say.

Rohr's rhetorical strategy seems to be to begin with a (presumably) sympathetic audience of public administrators, those who must run a Constitution. Having directed his argument at this sympathetic audience does not preclude him from reaching more dispassionate or even hostile readers. Hostile readers, given Rohr's professed intent of preaching to the choir, cannot claim that his argument fails because hostile readers remain unpersuaded. On the other hand, swaying some of the unbelievers only adds to, rather than taking away from, the success of Rohr's argument.

Having defined his audience and the form that his argument will take, Rohr proceeds to define the type of argument he will present to that audience:

> The argument of this book is presented more in the form of an essay than as a lawyer's brief or mathematician's theorem. I do not begin with postulates and proceed rigorously to the inevitable Q.E.D. My argument might better be described as reaching its appointed end through the plodding but sure process of two steps forward and one step back. The case against the constitutional legitimacy of the administrative state is not frivolous.[145]

One possible effect of this statement is to introduce a less rigorous standard of proof for the work. This is consistent with the carefully selected audience; a friendly receptive audience will not need to be swayed in the same sort of way that a (theoretically) impartial or even hostile jury would need to be in the adversarial forum of a courtroom. Rohr

does not make Crosskey's claim of objective truth, that is Rohr does not follow Ricoeur's first way of claiming that because his message is true all others are false. Significantly, Rohr also credits opposing views as "not frivolous." He seems aware that constitutional interpretation is hardly an exact science, even with the sort of imposing energy Crosskey applies to it. In a slim one volume work, Rohr hardly expects to present overwhelming evidence of the objective truth of his position. Rather, Rohr simply attempts to suggest the basis for viewing the administrative state as constitutionally legitimate.

Rohr's argument in To Run a Constitution suggests the constitutional legitimacy of the administrative state. Rohr's need for doing so seems to stem from the silence of the constitutional text on the subject of administration. Rohr opens his introduction by noting that:

> It has often been observed that the word administration does not appear in the Constitution of the United States. From this correct observation there often follows the erroneous conclusion that the framers of the Constitution did not care about administrative institutions . . . If Publius is taken as a reliable guide to the thinking of the framers of the Constitution, sound public administration and the efficiency it will produce must be counted among their most serious concerns. Administration is one of the few words Publius bothers to define . . . The word administration and its cognates appear 124 times throughout The Federalist Papers; more frequently than Congress, President, or Supreme Court.[146]

In this statement, Rohr appears to be trying to

overcompensate for what clearly concerns him as a weakness in his argument: the absence of the word "administration" from the Constitution's text. He introduces another text, The Federalist Papers, with the word appearing no less than 124 times, to remedy this omission. Indeed, in effect, Rohr introduces The Federalist Papers (and later the writings of the Antifederalists) to his reader as an exegesis to the Constitution, offering an explanatory argument that expands on the document itself. While The Federalist Papers gives insight into the intent of some of the Framers, it is a text, indeed, a literary project, in its own right. The question becomes to what degree is The Federalist Papers (or the writings of the Antifederalists) an explication of the Constitution? Does Publius take on a life of his own in the organic realm of textuality and become a voice perhaps as eloquent as but removed from the voice of the Framers of the Constitution? Rohr suggests that the tremendous prestige of The Federalist Papers within the constitutional tradition has clearly established them as part of a coherent "Founding Argument" in which the Constitution and the writings of the Antifederalists also plays a part.

A text's meaning, to state the obvious, is partially dependent on what is accepted as the text. For example, one's reading of the Old Testament is dependent on which books of the Old Testament are accepted as the word of God

and which are rejected. In this debate, various denominations of Christians have disagreed and presumably will continue to disagree.[147]

Rohr's leap of faith is in assuming that Publius is a reliable guide to the thoughts and concerns of the men who framed the Constitution. While this is hardly a unique view and is certainly convenient for Rohr's purpose, he offers no compelling evidence to the reader that Publius speaks for the framers in general. This is not to say that such a case cannot be made, or to say that Rohr is incapable of building such a case. What is interesting is that he chooses not to make the case that The Federalist Papers express more than the polemic of Jay, Madison, and Hamilton.

An explanation can perhaps be found in Rohr's view of himself as writing in a larger community of scholarship. If he views himself as part of the constitutional interpretive tradition, then the legitimacy of The Federalist Papers as a guide for the framers' intentions has already been established within that tradition. Rohr could therefore refer the skeptical reader to two centuries of imposing scholarship with which he has associated himself. Rohr deftly redefines what is meant by the Constitutional text, enlarging it to include the "founding argument" between the federalists and the antifederalists. Having done so, Rohr proceeds to prove his argument by examining how issues

raised by the contemporary administrative state were addressed in the founding period by participants in the founding argument.

In discussing the founding argument, Rohr relies most heavily of all on the three-person (Jay, Madison, and Hamilton) incarnation of Publius, the name with which each of The Federalist Papers is signed. Rohr elevates Publius' work to the status of secular religion, joining the Constitution as part of our secular canon. As such, he prefers to focus on the work as a coherent whole, choosing not to delve into the differences among the various authors. This is particularly interesting given Rohr's professed interest in the intent of the Framers. Clearly, Rohr seems to believe that there is some way of establishing a collective authorial intent, independent of the intent of individuals.

There are some cases where the identity of the author of a given federalist paper is unclear, but the identity of the author is well-known for the bulk of the Federalist. Rohr, however, consistently refers to Publius in citing individual essays from the Federalist, rather than to the particular author.

Rohr explains this choice in a revealing footnote:

> Throughout this book I refer to the authors of The Federalist Papers by their pseudonym "Publius." Only when I want to contrast one of the authors with another

> do I identify Madison, Hamilton, or Jay; but this is done quite sparingly. The reason I seldom identify the authors by their real name is that such identification weakens the force of The Federalist as a unified book. The Federalist is not simply a series of newspaper articles. There was careful planning and collaboration by the authors. There is a consistent argument sustained throughout the entire work that is blurred by giving more attention to the individual positions of the three authors than the authors themselves would have desired. I believe their preference to present themselves as Publius should be respected. The Federalist is one of those great books that we learn from rather than about. To do this I try to meet the authors on their own terms.[148]

Rohr asserts several things in this passage: the authorship of a particular paper is unimportant and plays little role in the making of meaning in the text, The Federalist Papers is a unified, coherent work, and the Federalist Papers are part of America's cultural and political canon.

In emphasizing the unity of the text and ignoring differences among the three authors and among the three essays, Rohr seeks to minimize the importance of the three men who produced the text. The text is an organic whole, not simply a collection of essays by three different authors. Clearly then, there is for Rohr an overarching unity to the text that outweighs the individual intentions of the three authors in any discrete Federalist paper.

In laying out this overall unity for the Federalist, Rohr makes a claim that elevates the text itself to the position of sacred text, suggesting that it is one of a "rare" class of great books that we learn from rather than

about. Indeed, Rohr discusses the importance of the Constitution itself on two progressively charged levels. He begins by observing that "At a descriptive level it is fairly obvious that the Constitution is of enormous public interest".[149] The second aspect of the Constitution's significance for Rohr is its position as "a symbol of the founding of the Republic, and in politics, foundings are normative".[150] He continues by observing that "the sanctity of the founding period for Americans will be quite clear to anyone who reflects on the path that tourists tread as they visit Philadelphia or the nation's capital. The salience of American civil religion is obvious . . . like all people, we need our myths."[151]

Nevertheless, a text's position as myth, as sacred document, as canon, does not absolve the reader of hermeneutical responsibility. For Aquinas, the greatest of all the academic disciplines is that of theology, for it is theology that deals with interpreting sacred texts.[152] In interpreting the secularly sacred constitutional text, Rohr's argument is not the zero-sum proposition advanced by Crosskey, where one is either with him or against him. Rohr's argument does not suggest that, because his view is valid, all others are invalid.

Rohr does not present his view of the Constitution as objective truth; instead, Rohr is presenting view of the

Constitution through the lens of the "Founding Argument." This interpretation reads the Constitution through the lens of the debate between The Federalist Papers and the writings of the Antifederalists. This approach does not deny the possibility of other readings; it suggests that the Public Administration is constitutionally legitimate given this particular approach to reading.

Stanley Fish would claim, however, that the Public Administration would therefore only be legitimate within the interpretive community that reads the Constitution through the lens of the founding argument. According to Fish, this interpretive community would be incompatible with any other interpretive community. Fish might point to Thomas Kuhn's[153] work and suggest that Rohr and Crosskey work from different, incompatible paradigms. Since the community of constitutional scholarship has moved beyond Crosskey's sort of textual analysis, the discipline now ignores his work. (More correctly, the community has never practiced Crosskey's approach to any significant degree.)

Kuhn remarks that "scientific revolutions are here taken to be those non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one."[154] As for the adherents of the old, discredited paradigm, Still more men, convinced of the new view's fruitfulness, will adopt the new mode of practicing normal science, until at last only a few old

holdouts remain. And even they, we cannot say, are wrong . . . at most [we] may wish to say that the man who continues to resist after his whole profession has been converted has ipso facto ceased to be a scientist.[155]

What then of Crosskey, who follows an approach that had never been the dominant one in his profession? Crosskey is neither a discredited adherent of a long-dead paradigm, nor is he likely to be in the vanguard of a new paradigm. Crosskey is railing largely in vain against the still powerful traditional paradigm of constitutional scholarship, that is if the measure of his success is in how widely his views are adopted.

Kuhn is careful to assert that one paradigm is not necessarily better than another. One paradigm replaces another, or a paradigm fails to catch on, because of reasons internal to the given scientific community, not because of some objective standard that judges the validity of approaches to knowledge creation.[156] Stanley Fish would suggest that as with Kuhnian paradigms, one way of reading should not be privileged over another, though it is likely that one approach to reading will become more popular.

Fish offers a theory of reading that seems to view texts in general the same way that judicial activists view the Constitution. Robert Scholes, on the other hand, like Rohr and Crosskey, believes that the text matters in interpretation. Like Rohr and unlike Crosskey, however, Scholes offers some room for going beyond the text and only

the text to look at the intention of the author.

Chapter 4:

Fish and Scholes: Theories of Reading

Like judicial activists, Stanley Fish views reading as a community act, rather than a series of individual act. Readers read texts out of a particular interpretive tradition they share with a community. In his Is There a Text in This Class?, Fish suggests that an interpretive approach to a text is valid, because there are no such things as texts in the traditional sense. Instead, all meaning resides in the reader's interpretive community.

To illustrate his belief that language's meaning depends on the interpretive community to which one belongs, Fish tells the story of a student of his who asked a professor, with whom she was preparing to take a class, whether he would be taking a canonical approach to literature in his class:

> On the first day of the new semester a colleague at Johns Hopkins University was approached by a student, who, as it turned out, had just taken a course from me. She put to him what I think you would agree is a perfectly straightforward question: 'Is there a text in this class?' Responding with a confidence so perfect he was unaware of it (although in telling the story, he refers to it as falling into the trap), my colleague said 'Yes, it's the Norton Anthology of Literature,' whereupon the trap (not set by the student but by the infinite capacity of language for being appropriated) was sprung: 'No, no," she said, 'I mean in this class do we believe in poems and things, or is it just us?'[157]

Fish neatly implicates his reader in the professor's misinterpretation of the student's use of the word "text" by leading his reader to make the same initial interpretative mistake, assuming "text" to mean "textbook". Fish clearly relishes the lessons of the instability and indeterminability of meaning provided by this conversation: the problems of language in communicating meaning, the absence of a clear signifier and signified in the conversation, the multiple levels of meaning inherent in language. Having thus startled his reader, Fish then reassures his reader that these implicit observations on language do not necessarily mean a slide into the sort of "howling chaos" feared by Berger and Luckmann in The Social Construction of Reality:[158]

> Now it is possible (and for many tempting) to read this anecdote as an illustration of the dangers that follow upon listening to people like me who preach the instability of the text and the unavailability of determinate meanings; but in what follows I will try to read it as an illustration of how baseless the fear of these dangers finally is.[159]

In other words, Fish defends his theory against charges that they will lead to a slide into solipsism.

Fish's theory assumes that language has no independent meaning outside of the interpretive assumptions that a reader brings to it:

> A sentence is never not in context. We are never not in a situation. A statute is never not read in the light of some purpose. A set of interpretive

> assumptions is always in force. A sentence that seems to need no interpretation is already the product of one.[160]

According to Fish, these interpretive assumptions, the context that a reader brings to a text, stem from the interpretive community to which the reader belongs. Membership in an interpretive community leads to a shared set of assumptions, a shared way of reading, a shared context among members of the interpretive community that they will bring to the text.

While Fish is not very specific regarding the attributes of these interpretive communities, as already suggested they seem analogous to Kuhn's scientific communities.[161] In illustrating how an interpretive community works, Fish is more specific, however. He tells his famous story of a class studying religious poetry misreading an assignment, that Fish had written for another class on linguistics, as a religious poem. Fish explains that he placed the following list of authors on the board for his class on linguistics and literary criticism:

Jacobs-Rosenbaum

Levin

Thorn

Hayes

Ohman?

After this first class left for the day, according to Fish, he left the assignment on the board to see how his second class, working exclusively with religious poetry, would react to it:

> When the members of the second class filed in I told them that what they saw on the blackboard was a religious poem of the kind they had been studying and I asked them to interpret it. Immediately they began to perform in a manner that, for reasons which will become clear, was more or less predictable.[162]

Fish relates in detail how the class interpreted the assignment as a religious poem, noting the cross-like shape, the reference to the crown of thorns, the Rose of Sharon, Omen, Amen, Oh Man, the fact that three names are Hebrew, two names are Christian, and one, Ohman, is ambiguous, the ambiguity being represented by a question mark.

For Fish, the class could not have read this text in any way other than as a religious poem, since religious poetry and the conventions thereof were the interpretive tools that they brought to the text. In an example of "seek and ye shall find," the class molded its interpretation of the text to fit their preconceived interpretive assumptions. Their interpretive community was held together by shared assumptions about reading religious poetry. Therefore, anything that they read seemed like religious poetry, reminiscent perhaps of the phenomenon where nails seem to spring up everywhere when one is equipped with only a

hammer. Similarly, if one is to approach the Constitution with an emancipatory social agenda, the Constitution is likely to become an emancipatory document for that particular reader, operating from his or her particular interpretive community.

Interpretive communities, Fish informs his reader, prevent the activity of interpretation from devolving into a fragmented collection of individuals. The shared set of beliefs that comprise interpretive communities allow more than one person to share a reading of a given text. The Supreme Court in Peckham, reading the Fourteenth Amendment as providing for a right to liberty of contract, is an interpretive community, reading the text in a manner incompatible with other communities. Interpretive communities are communities of individuals with the homogeneity implied therein; they are not simply an aggregation of individuals. Fish tells his reader that:

> At this point it looks as though the text is about to be dislodged as a center of authority in favor of the reader whose interpretive strategies make it; but I forestall this conclusion by arguing that the strategies in question are not his in the sense that they would make him an independent agent. Rather, they proceed not from him but from the interpretive community of which he is a member; they are, in effect, community property, and insofar as they enable and limit the operations of his consciousness, he is too. The notion of "interpretive communities" that had surfaced occasionally in my discourse before, now becomes central to it. Indeed, it is interpretive communities, rather than the text or the reader, that produce meaning and are responsible for the emergence

> of formal features. Interpretive communities are made up of those who share strategies not for reading but for writing texts, for constituting their properties. In other words these strategies exist prior to the act of reading and therefore determines the shape of what is being read rather than, as is usually assumed, the other way around.[163]

In essence, Fish subsumes writing into the act of reading. Texts have no independent existence outside of the hermeneutical strategies of the given interpretive community. In reading a text, members of an interpretive community construct their version of the text, and rewrite it according to the interpretive predilections of the given interpretive community. Thus, there can be as many "texts" of a given work as there are interpretive communities. Writing, therefore, becomes a creation of the community of readers. Discussing possible readings of Faulkner's "A Rose for Emily," Fish point out that:

> The result would be that whereas we now have a Freudian "A Rose for Emily," a mythological "A Rose for Emily," a Christological "A Rose for Emily," a sociological "A Rose for Emily," a linguistic "A Rose for Emily," we would in addition have an Eskimo "A Rose for Emily" existing in some relation of compatibility or incompatibility with the others.[164]

Given the multiplicity of possible readings he sees for any text, for Fish, the interpretive approach to the Constitution would not only be the best approach, it is the only approach. All readers interpret texts in the image of their own interpretive community. This includes those who claim to be reading the text literally.

As Chief Justice Hughes might suggest,[165] there are therefore as many Constitutions as there are variously minded Supreme Courts. For Fish, a text has no independent existence; it simply is created in various forms depending on the interpretive assumptions of a given community of readers. The Constitution, according to this approach, would be written differently by each Supreme Court, as the assumptions that guide that interpretive community shift. A Lochner Court can ordain a Constitution replete with liberty of contract. A Griswold Court can create a Constitution with a right to privacy in its penumbras to the Bill of Rights and the Fourteenth Amendment. A Roe Court can add a right for a woman to control her own body to the Griswold Court's right to privacy. There is no objective Constitution, no correct or original reading of it; there can only be a correct or best reading to fit the beliefs of any given interpretive community.

This raises the issue of what, for Fish, is or is not an acceptable reading, given the seemingly infinite set of possible readings that are plausible under his theory. Again, he answers this question by referring his interrogator to the nature of the interpretive community in question. In other words, what is an acceptable reading is contingent upon the interpretive community doing the reading (and writing!). There can be no standard to judge an

acceptable reading except within the context of an interpretive community. For example, Fish argues that the previously mentioned way of reading Faulkner as writing about the Eskimos seems ridiculous only because most interpretive communities have no reason to believe that Faulkner knew or cared anything about Eskimos. The discovery of a diary of Faulkner's, revealing his obsession with the Eskimos would, in Fish's view, vindicate this interpretive community's reading as at least plausible. Because the interpretive community's reading does not seem plausible today, Fish argues, does not mean that it will implausible tomorrow.[166]

The text therefore is irrelevant, devoid of meaning until an interpretive community writes it in its own image. Therefore, for Fish, literalism attempts to be literal about something, an objective text, that simply does not exist. Literalists, in Fish's view, are as much of an interpretive community as any other group of readers. They simply choose to call their own particular reading of a given text the true reading.

Robert Scholes attacks this view of Fish's that strips all meaning from the text and grants all power to the critic. In doing so, Scholes asserts that texts have meaning independent of the critic. This is why some texts, in Scholes' view, have the power to change the world.

Like Crosskey, Scholes resists an attempt to place texts in a fallen world of readers run amok, with texts stripped of any determinate meaning. While he does not propose a project of advocating best readings of texts[167], Scholes looks to understand the meaning of texts as revealed by their historical contexts. Crosskey would approve of Scholes' citation of Jameson's injunction to "always historicize."[168] In Textual Power, Scholes seeks to apply literary theory to the classroom, and in doing so takes dead aim at Stanley Fish.

Scholes rejects Fish's notion of interpretive communities, asserting that "I shall attack the notion of 'interpretive communities' as vague, inconsistently applied, and unworkable".[169] Scholes admits that "[Fish] is right to question the status of texts, pointing out that a text is not simply "there as we have sometimes assumed it to be. Interpretation does enter the reading process at a very early stage."[170] This does not mean, however, according to Scholes, that the text must always genuflect before the critic. Nor does this mean that the reader, despite the early entry of interpretation in the reading process, constructs texts.

The interpretive community of the constitutional tradition, for example, reads the same Constitution that Crosskey does. They simply draw different conclusions from

the same text. They do not create different texts, different Constitutions.

Scholes feels that interpretation of texts is necessary largely because the texts that have been elevated in our cultural canon are those that require interpretation. Students are taught to read and to genuflect before a cultural canon that has been chosen for them by the traditions of literary criticism. Critics, of course, tend to value that literature which requires the critic to mediate the meaning of a text to the awed student. Similarly, constitutional scholars have a vested interest in making the document more complex, because the more complex the document is, the more constitutional scholars are needed. Scholes explains:

> This notion of literature as a secular scripture extends roughly from Matthew Arnold to Northrop Frye in Anglo-American academic life. It is linked with the rise of a study of modern literatures to a central place in the liberal arts curriculum. And it is the dissolution of this particular consensus that has been troubling to us of late. Since the nineteen-sixties we have been losing our congregation, and we are scared to death that our temples will be converted into movie theaters or video parlors and we will end our days doing intellectual janitorial or custodial work.[171]

Scholes stresses the possibility of individuals reading as individuals, rather than simply acting as part of an interpretive community. This view is particularly useful with regard to Crosskey. Having invested five decades of research in his reading of the Constitution, it seems fair

to say that Crosskey develops his own reading. He does not passively read according to the dictates of some interpretive community.

As Scholes convincingly points out in his chapter "Who Cares About the Text?" Fish's concept of interpretive communities is vaguely defined. Indeed, for Scholes the concept of interpretive communities is a dangerous one:

> I, on the other hand, have been trying to demonstrate that Stanley Fish's notion of 'interpretive communities' is a bad idea because it is full of internal inconsistencies and finally misrepresents our actual experience as interpreters of texts. I also want to argue that Fish's whole theory of textual interpretation is both dangerous and wrong: dangerous because it is partly accurate, and wrong because it is mistaken where we are free, where we are social and where we are individual. And it is especially wrong in its notion of what a text is and what an interpreter does with a text.[172]

Fish, to Scholes, is partially correct in asserting that interpretation plays a crucial role in the reading process, but he is wrong in assuming that reading is a group rather than an individual act. Further, he is wrong in assuming that various interpretive communities are incapable of communicating with one another, of sharing understandings and interpretive approaches; in Scholes' view this would ironically doom Fish's communitarian readers to interpretive isolation. Because we are individuals reading, readers seek discussion, given people's preference for community over isolation.

Scholes therefore accepts much of Fish's reasoning but rejects as disingenuous the notion that texts have no meaning independent of the community in which they are interpreted. To enjoin critics from bowing down before texts is not to suggest that texts have no meaning and are simply constructs of various communities of readers. While agreeing that the reader will always bring certain biases to the text, Scholes suggests that texts do mean something independent of the individual reader's interpretations. All informed readers of the Constitution agree on certain basic information, that it is written in English, that it seeks to found a republic, that it is an important part of our governance process.

In attacking Fish's notion that texts mean nothing without readers, that readers create texts, Scholes instructs his reader to:

> Notice what Fish has done. First he has asserted that readers make texts; then he has shifted his position to say, quite specifically, that meanings are produced by neither text nor reader but by interpretive communities. But he has never made it clear what an interpretive community is, how its constituency might be determined, or what could be the source of its awesome power. In practice, he sometimes means simply those who share certain linguistic and cultural information: that is, all those who would understand a certain speech in a certain situation as a request to open the window. But at other times he means something like all Christian readers of literary texts. . . . A greater difficulty is the putting of such things as the English language and Christian typology on the same plane. One may debate whether Samson Agonistes is or is not a Christian poem. But in order to debate that

> one must perceive the poem as written in the English language.[173]

Scholes expands from this point to attack Fish's (in)famous and previously cited example of the assignment that was read as a religious poem by another class. Scholes recalls that:

> When the second class entered the room he told them that this was a religious poem of the kind that they had been studying, and they duly proceeded to find all sorts of Christian iconography in the poem, suggesting that "Jacobs-Rosenbaum" was a combination of Jacob's ladder and the rose tree symbolizing the Virgin Mary, and so on . . . Fish asserts 'Given a firm belief that they were confronted by a religious poem, my students would have been able to turn any list of names into the kind of poem we have before us now.' He then offers an empirical check. 'You can test this assertion by replacing [the names] with names drawn from the faculty of Kenyon College--Temple, Jordan, Seymour, Daniels, Star, Church.' He doesn't say how the names were 'drawn,' but it is clear that this is no random list, and that is no trivial matter. If you play cards with Stanley Fish, don't let him bring his own deck.[174]

Besides suggesting that Fish had 'loaded the deck' with this example, Scholes goes further to argue that Fish was being untruthful. Scholes suggests that:

> the yoke, I believe, is on anyone who accepts this anecdote as true. Surely Fish's students were playing a game either with or on their teacher. Texts have a certain reality. A change in a letter or a mark of punctuation can force us to perceive them differently, read them differently, interpret them differently.[175]

Scholes rejects the notion that all texts are written by groups of readers, constructed according to the interpretive community that is reading them. This would mean, he argues, that there is no room for valuing or

marginalizing a particular text. According to Fish's view, the Constitution would have no more inherent meaning or significance than a menu from a fast food store. For Scholes, texts matter, because some texts speak across different communities of readers; whatever the readers' differing interpretations, they agree on the significance of the text.

Scholes concludes that:

> A written text is the record of a transaction between a writer and the language in which the text is composed. It is indeed always the product of a situation. . . . If this principle were applied to written texts, then all interpreters of literature would have to take as their primary goal the recovery of the codes (linguistic, generic, ideological) that constituted the situations of the text they have chosen to interpret. . . . Who cares about the text? We all do.
>
> We care about texts for many reasons, not the least of which is that they bring us news that alters our way of interpreting things. If this were not the case, the Gospels and the teachings of Karl Marx would have fallen upon deaf ears. Textual power is the power to change the world.[176]

Texts are important because they bring meaning to the reader; they can influence the reader's way of viewing the world. In a sense, texts can change readers just as readers can revise the meaning of texts.

Clearly the American Constitution fits Scholes' criteria of a text which has the power to change the world. The document has stood without much dissent for over two centuries at the center of American governance. This central role of the Constitution accounts for interpreters'

desire to find something in that particular text to confirm their own intellectual projects. The canonical status of the Constitution lends some of its glory to those who use it to advance an argument, by implication possibly elevating the argument itself to the level of canon.

Chapter 5:

Towards a Conclusion

An important tyranny to be avoided, in interpreting a text, is highlighted by George Will in a recent column. Writing about the devaluation of history by contemporary academics, Will warns against a similar devaluing of literature. He states:

> The new historians are like deconstructionist literary critics who displace authors, explaining what the particular authors were really doing when they wrote -- whether the authors knew it or not. The new history elevates the historian to the role -- half priest, half artist -- of explaining history's meaning to the masses who obdurately persist in believing that politics matter.[177]

When constitutional scholarship reaches the point of suggesting what the founding fathers were doing, whether they knew it or not, and of lecturing the American people on their wrongheaded notions of what the document means, then constitutional scholarship has begun to border on tyranny. Just as an attempt to create a persuasive orthodoxy, as does Crosskey, could be tyrannous, so would be an attempt to force acceptance of a revisionist reading, marginalizing the previous orthodoxy in the process. Stanley Fish and his post-modernist ilk, with their impressive arsenal of reading tools, offer a dangerously tempting invitation to do just this, to replace the intent of the framers with the

predilections of the reader. While deconstructing the Constitution or approaching it from the standpoint of interpretive communities may be interesting and useful ways to approach the text, they should never become the only ways. For in doing so, they become as oppressive as the canonical orthodoxies that post-modernism claims to be rebelling against.

The problem that I have always had with Stanley Fish is the implicit logic of the idea of interpretive communities. Carried to its logical conclusion, Fish's notion would suggest that all members of interpretive communities will have an identical reading, since the interpretive authority comes from the community and not from the individual. This would imply either interpretive communities of one or a much greater degree of hermeneutical homogeneity than is evident in today's scholarship.

To my mind, whatever the interpretive community to which they belong, Rohr and Crosskey's purposes are hardly incompatible. In developing his "unitary theory of the Constitution," Crosskey anticipates and strengthens Rohr's case for the legitimacy of the American administrative state. If Congress, indeed, has the economic powers that Crosskey seeks to invest it with, then the need for an administrative apparatus to use those powers is clearly implied.

Crosskey and Rohr are most alike, however, in recognizing the Constitution's role as a touchstone for our civil religion. It is this realization that provides the common language needed to reframe the relation of the two readings as dialectical, not oppositional. Rohr acknowledges that "We can have our Constitution as the object of civil religion, and we can also have it as an object of close scrutiny and critical evaluation".[178] In his introductory review of Crosskey's previous two volumes, at the beginning of the third volume, Jeffrey observes that: "Quite predictably, the adjective "constitutional" has come to serve as something very much more than a neutrally descriptive label; it has become the ultimate word in the positive evaluation of any legislative measure."[179]

While they differ to some extent on the method of interpretation, Rohr and Crosskey agree on what is at stake. Constitutional interpretations are the stuff that forms the doctrine of our civil religion. Crosskey and Rohr are not espousing different, mutually incompatible religions.

Unfortunately, judicial activism's cavalier disregard for the text of the Constitution renders this approach to reading fundamentally incompatible with approaches to reading, such as Rohr and Crosskey's, that value the contents and meaning of the text. Either the text matters, as it does for Rohr and Crosskey, or it does not, as with

judicial activism. When the constitutional text ceases to matter, the American civil religion loses its cornerstone and America quickly will lose any notion of a principled civil religion.

This loss is not to be taken lightly. Jean-Jacques Rousseau, in the final book of his The Social Contract suggests that a civil religion is what is needed to hold together a republic.[180] Rousseau argues that a civil religion will more closely bind the people to the state, since the political and the religious will be combined in the civil religion. While his notion of how such a civil religion would work in practice is sketchily defined, Rousseau does give some guidelines for how a civil religion might work under his concept of the social contract:

> The dogmas of the civil religion must be simple and few in number, expressed precisely and without explanations or commentaries. The existence of an omnipotent, intelligent, benevolent divinity that foresees and provides; the life to come; the happiness of the just; the punishment of sinners; the sanctity of the social contract and the law - these are the positive dogmas. As for the negative dogmas, I would limit them to a single one: no intolerance. Intolerance is something that belongs to the religions we have rejected.[181]

Rousseau emphasizes that "subjects have no duty to account to the sovereign for their beliefs except when those beliefs are important to the community."[182]

The Constitution, in many ways, fits Rousseau's definition of an appropriate civil religion. American

society compels affirmation of the beliefs expressed in the Constitution with the oath of office taken by civil and military servants of the state. While Americans do not compel any particular religion, political affiliation, or creed, we do compel our government officials to swear an oath to the Constitution. Article II, section i of the Constitution requires the president, for example, to:

> take the following Oath or Affirmation:-"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States."

Article VI requires that:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation to support this Constitution.

As Rousseau suggests is proper, tolerance is one of the beliefs inherent in the Constitution of the United States. The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." How different this stark assertion of religious tolerance, indeed, a freedom of religion that is far beyond tolerance, is from England, where even today the Anglican church is the official state church and certain offices are jealously guarded from papist influence. The Sixth Amendment explicitly rejects England's religious tests for offices by stating "no religious Test shall ever be

required as a Qualification o any Office or public Trust under the United States.

The Constitution provides for a system firmly anchored in the rule of law, as Rousseau states "the sanctity of law." The Supremacy Clause, in Article VI of the Constitution, states flatly that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In asserting the supremacy of the Constitution, in proclaiming its inviolability from encroachment by the states, Article VI guarantees the sanctity of the law.

As for "the happiness" of the just which Rousseau considers one of the positive dogmas of the civil religion, the Preamble includes as two of its purposes for ordaining the Constitution to "promote the general welfare" and to "secure the blessings of liberty for ourselves and our posterity." Regarding "punishment of sinners," the Preamble promises to "establish justice."

Further, in the discussion of impeachment in Article II Section 4, the Constitution provides specifically for the punishment of malefactors who come to hold public office. Article II Section 4 states: "The President, Vice President, and all civil Officers of the United States,

shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors." Here, as with the Bill of Rights, the punishment of sinners is tempered by a concern for the just individual who might be unfairly accused. Removal of office comes only after impeachment and conviction, just as the Fifth Amendment's Due Process Clause guarantees that "No person shall . . . be deprived of life liberty or property, without due process of law."

The Constitution, however, does not provide for an "omnipotent, intelligent, benevolent deity that foresees and provides." As Thayer suggested in our earlier discussion of judicial activism, it is left for the political branches to establish laws for the general welfare of the populace. The Constitution did not envision, and in the long run, it seems to me, cannot tolerate, a judiciary that sets itself up as an omnipotent God to look ahead for our happiness. This is left to the more complicated system of government established by the Constitution.

Gary Wamsley argues for Refounding Public Administration[183] and suggests, as does John Rohr, that the Public Administration is part of the system of government established by the Constitution. He suggests that American Public Administration was misfounded, "connected vaguely with Progressivism and Civil Service Reform."[184] He seeks

to refound the Public Administration in "our 'enacted Constitution' or at least with a Federalist interpretation of it. For that interpretation encouraged and anticipated The Public Administration."[185] In doing so, Wamsley hopes to use Rohr's constitutional defense of Public Administration to promote dialogue about the place of the Public Administration in the American polity. He is able to do this because of the Constitution's central place in our civil religion. I hope to briefly examine the approach to reading implicit in this attempt to refound the Constitution. The Constitution can be refounding according to what approach to reading?

Before initiating a dialogue about Public Administration, Wamsley joins with his colleagues at Virginia Tech's Center for Public Administration and Policy to rehabilitate it. They remark:

> Thus our political culture has come to include a pernicious mythology concerning the public sector and public administrators which needs to be corrected before the American dialogue can enter a new and meaningful phase . . . We see no way of arresting the pathologies of our political system and coming to grips with the sizable problems of our nation's political economy without a new way of thinking about, speaking of, and acting towards the Public Administration.[186]

Given that a disdain for public administrators is a deeply ingrained part of the American political psychology, rehabilitating bureaucracy as "The Public Administration" and refocusing the public dialogue requires a powerful

symbol of some sort to overcome the public's biases against bureaucracy.

The Constitution provides such a symbol. Unfortunately, in the authors' view, public administrators themselves have forgotten the Constitution: "[public administration's claim of nonpartisan instrumentality] is neither well grounded in the Constitution nor adequate to the role demands of the late twentieth century"[187] I would suggest that a grounding in the Constitution would include an awareness of the various approaches to reading the Constitution and questions of constitutional interpretation.[188] To remind public administrators of their constitutional legitimacy and to suggest this legitimacy to a skeptical, even hostile public, the authors posit the Public Administration as part of a "founding covenant" that created American governance. They remark:

> The Public Administration must always act within the constraints imposed by its origin in covenant, a covenant manifested in the Constitution, the Civil Service Reform tradition, and historic experience. The word covenant has sacral overtones that are not altogether inappropriate for our purposes . . . The Public Administration therefore should look to the past as a prologue to the great public dialogue that inspires a free society. The Constitution should thus be viewed not as "The Word" but as "The Living Word."[189]

As the centerpiece in America's founding covenant the Constitution serves as the "prologue for public dialogue." Because this prologue, as demonstrated by Rohr in To Run a

Constitution, views public administration and public administrators as legitimate parts of American governance, the Public Administration is legitimated in the public's eyes. Because the Public Administration is legitimated, it can take place in the public discussion as an empowered participant, not as an object of scorn and derision.

America's constitutionally based civil religion, therefore, helps to heal the breach between the Public administration and the public that they serve. Indeed, the authors feel, as did Rohr in To Run a Constitution, that the Public Administration heals a major defect in the constitutional order regarding representation of the public. The authors suggest:

> If the Public Administration asserts and accepts its moral authority and rightful claim to be a constitutionally legitimate participant in the governance process, it can contribute to the correction of a major defect in the Constitution: its unsatisfactory resolution of the problem of representation . . . In light of this constitutional defect, The Public Administration as an institution of government has as valid a claim to being representative of the people in both a sociological and functional sense as a federal judge appointed for life, a freshman Congressman narrowly elected by a small percentage of the citizens in southeast Nebraska or a senator from Rhode Island.[190]

This draws from Chapter 4 of Rohr's To Run a Constitution, and presents the Antifederalist portion of the Founding Argument. This illustrates why it is necessary for Rohr to draw on both the constitutional tradition, which

includes both sides in the Founding Argument, and the Constitution, which was the negotiated result of this argument. In fulfilling this representational role, the authors assert that the public administrator must be "committed to . . . praxis and reflexiveness."[191] The Constitution serves as both a guide for praxis and a source of reflexivity, as exemplified in the oath of office. According to the authors, "this oath initiates administrators into a community created by that Constitution and obliges them to know and support Constitutional principles that affect their official spheres of public service."[192] Significantly, even in taking the seemingly personal oath of office, administrators are in fact operating as part of the community of the American polity. Thus, the Constitution serves to bind together participants in that polity by reminding them that they belong to the same constitutional order.

This community, however, is not just an interpretive community of those who share the authors' Federalist interpretation of the Constitution. Wamsley states: "we feel that if the Manifesto accomplished nothing else it served well the purpose of stimulating debate and discussion on a topic that is crucial at this juncture in history--the role of The Public Administration in the governance of America."[193] In fact, some of the dialogue stimulated by

the authors comes from people who take a very different view of the Constitution, public administration, and American governance in general.[194]

In the dialogue on constitutional interpretation, Crosskey's scholarship is not now, if it has ever been, fashionable, but it seems to me that even the most ecumenical community needs its mighty bulwarks.[195] Community, unlike Crosskey, is fashionable; it is a word much on the lips of the American academy these days.[196] Community has a positive connotation much more palpable than the stark claims of truth that Crosskey makes.

It is precisely because Crosskey is often unpalpable, that his scholarship is important. Without the Crosskeys of the world, in our zest for embracing diversity, for community, it would be disastrously easy to lose sight of any boundaries in our thinking. While "facts" may be simply rhetorical artifacts, while truth may be relative, while language may be permeable, Crosskey's literalism stands as a watchful check against the temptations of judicial activism that would slide the Constitution into the murk of relativism. Crosskey demands the intellectual rigor often lacking in our rush to achieve diversity. While interpreting the Constitution should invite discussion, it should not do so at the cost of utterly ignoring the text that is purportedly being discussed. Scholes reminds us

that we all care about the text. Crosskey offers us the stimulus to care deeply about the Constitutional text.

The Constitution can empower public administrators, but since they do not simply create its meaning to fulfill their needs, it also limits them. This realization should help, not hurt the "Agency Perspective" of the Refounding project. Given critics' fears of a technocracy, just as the Constitution provides a normative base for Agency, so it limits abuses of Agency. Here even the Constitution bridges those of differing viewpoints. It empowers those who would praise bureaucracy, and it reassures those who would bury it.

The authors of Refounding Public Administration are not alone in their project of grounding and legitimating public administration in the Constitution. In Public Administration and Law, David Rosenbloom asserts that:

> Traditional public administration has stressed the need for efficiency above all else . . . Clearly in a constitutional democracy such as the United States, the polity may prefer that public administration promote justice and freedom more than efficiency. Therefore, it is not surprising that when the federal judiciary began to force its values upon contemporary public administration, it promoted constitutional concerns as opposed to the administrative concerns with efficiency.[197]

If I have done anything in this essay, I hope it is to suggest that the phrase "constitutional concerns" cannot be taken to simply refer to a unified set of concerns that are

revealed or available simply upon a reading of the text. Reading the Constitution in Crosskey's rigorous, literalist fashion will uncover one set of constitutional concerns. Reading the text as part of a "founding argument" will uncover a somewhat different set of concerns. Reading the text as a "living document" to fit today's society will uncover as many different sets of concerns as there are social problems to address.

In his concluding paragraph Rosenbloom exhorts public administrators to learn constitutional law. He suggests:

> From this perspective, a new and heavy burden is placed upon public administrators. They must know constitutional law as it affects their activities, and they must act in accordance with it. Consequently, the study of these aspects of law should become part of the training of civil servants.[198]

In effect, Rosenbloom is recommending constitutional literacy for bureaucrats. I heartily applaud this recommendation and hope that this essay adds an additional element to public administration's notion of what constitutional literacy is. Constitutional literacy is not simply knowing what the Constitution says. It is being self-reflexive about how one goes about interpreting what the Constitution means. Reading, for me is the making of meaning. Different ways of reading the Constitution are different approaches to making meaning from the text.

Public administrators need to be aware of their own

approach to making meaning in interpreting the Constitution and need to recognize that there are multiple approaches to reading the Constitution. Constitutional interpretation is a rich tradition that demands rigor and self-reflection; the Constitution is not a sign on the beach exhorting administrators to not *bring food on the beach or walk the dog between the hours of 9:00 and 5:00 a.m.* The Constitution is not a single revealed truth; it is a part of our secular canon which provides a normative grounding, a source of reflexivity, a beginning in other words, for those who seek their own truth in pursuit of the vocation of public administration.

When public administration scholars assert that they legitimate their field in the Constitution, that they wish to refound their field in the Constitution or ground their field in the Constitution, I would first ask "whose Constitution?" A "living Constitution" provides a grounding akin to quicksand. A Constitution in the tradition of the founding argument provides a grounding that entwines public administration in our society's ongoing debate between Federalist concerns about central authority and Antifederalist concerns about local autonomy and the community interaction implied therein. A Constitution based in Crosskey's work, my own preference, provides a firm, rigorous anchor, though one that can be accused of being

somewhat inflexible.

Regardless of one's approach to the Constitutional text, the text is something to be listened well to, not passively accepted blithely ignored, or read assuming that because one way of reading is correct all others are incorrect. Meaning, for Crosskey, Rohr, even judicial activists, even cynical graduate students, comes from a dialectical relationship between the reader and text. Public administrators should recognize themselves as a party in such a dialectic, not as a mere observer.

Notes

1. Mina Shaughnessy, Errors and Expectations: A Guide for Teachers of Basic Writing, (New York: Oxford University Press, 1977).

2. Robin Feuer-Miller, Dostoyevsky and the Idiot: Author, Narrator, and Reader, (Cambridge: Harvard University Press, 1981).

3. Alfred H. Kelly, et. al., The American Constitution: Its Origins and Development, Sixth Edition, (New York: W.W. Norton and Company, 1983), p. 661.

4. Associate Justice Scalia is the best example, to my mind, of a literalist on today's Supreme Court. This is not simply an ideological position, as some of Scalia's most scathing dissents have been directed at a conservative majority, particularly if the majority is lead by Justice O'Conner. O'Conner's willingness to engage in her own interpretive projects seemingly has earned her Scalia's formidable enmity.

5. Ibid., p. 660.

6. I use "intentionalist" to capture Rohr's focus on the Framer's intent in interpreting the Constitution. Rohr allows for authorial intent in examining the Constitution, but he does not go so far as to embrace the "Living Constitution" metaphor.

7. Rosenbloom's work on the Constitution and public administration includes: Samuel Krislov and David H. Rosenbloom. Representative Bureaucracy and the American Political System. (New York: Praeger, 1981), David H. Rosenbloom. Public Administration and Law: Bench and Bureau in the United States. (New York: Marcel Dekker, 1983), and David H. Rosenbloom. Federal Service and the Constitution. (Ithaca, N.Y.: Cornell University Press, 1971).

8. Robert F. Cushman, Leading Constitutional Decisions, Seventeenth Edition, (New York: Prentice-Hall, 1987), pp. 188-189.

9. Wallace Mendelson, "The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter," Vanderbilt Law Review, 31: 71-87, 1978.

10. James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harvard Law Review 129 (1893).7 in Walter F. Murphy, James E. Fleming, and William F. Harris, II, American Constitutional Interpretation, (Mineola, New York: Foundation Press, 1986), p. 476.

11. Kelly, Harbison, and Belz, op. cit., p.

12. Thayer, op. cit., p. 477.

13. Ibid.

14. Ibid.

15. Ibid., p. 478.

16. Ibid., p. 481.

17. Ibid.

18. Mendelson, op. cit., p. 15. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

19. Ibid.

20. Ibid., p. 16.

21. Of the four Justices Ellen Goodman once disparaged as "the Nixon Four," only Rehnquist turned out to be an unqualified conservative. Chief Justice Burger, Nixon's first appointment to the Court lacked the intellectual force to spar successfully with William Douglas or William Brennan. Burger's desire to be in the majority, at all costs, lead him to join the majority in some notoriously unpleasant decisions for the Nixon Administration, including Roe v. Wade and Nixon v. United States.

Justice Harry Blackmun was originally labelled the "Minnesota Twin" of the Chief Justice. Quickly, however, Blackmun drifted toward the center then the activist wing of the Court. This drift is best exemplified by Blackmun's majority opinion in Roe v. Wade (discussed in Chapter 5).

Justice Powell became the dominant voice of the Court's center. He was staunchly conservative on criminal justice issues, but less predictably reactionary than Rehnquist on social issues. For example, his opinion in Bakke v. California gave one of the first judicial nods to affirmative action, hardly a favorite social remedy of the man who appointed him.

22. William H. Rehnquist, "The Notion of a Living Constitution," 54 Texas Law Review 693 (1976) in Murphy, op. cit., p. 163.

23. Ibid.

24. Ibid., pp. 163-164.

25. Ibid., p. 164.

26. Ibid., p. 165.

27. Ibid., pp. 165-167.

28. Ibid., p. 168.

29. 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (19550.

30. Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass: Harvard University Press, 1972). In Murphy, Fleming, and Harris, op. cit., p. 169.

31. Ibid., p. 170.

32. 304 U.S. 144 58 S.Ct. 778, 82 L.ed. 1234 (1938).

33. Murphy, Fleming, and Harris, op. cit., p. 483.

34. Murphy, Fleming, and Harris, op. cit., p. 833-834.

35. Laurence Tribe's Testimony to the U.S. Senate, Subcommittee on Separation of Powers, The Human Life Bill: Hearings on S. 158, 97th Cong. 1st Sess., I, 263-271.

36. 381 U.S. 479, (1965): 486.

37. 411 U.S. 1 (1973): 36.

38. Ibid., p. 36.

39. Ibid.

40. See Marshall's concurrence in Furman v. Georgia, 408 U.S. 238 (1972).

41. Lochner v. New York, 198 U.S. 198 (1905).

42. Ibid., p. 466.

43. Ibid., p. 467.

44. Ibid.

45. Ibid., p. 468.

46. Ibid., p. 474.

47. Ibid.

48. Ibid.

49. Ibid.

50. Ibid.

51. Griswold v. Connecticut, 381 U.S. 479 (1965).

52. Ibid., p. 484.

53. Ibid., pp. 481-482.

54. Ibid., p. 482.

55. Ibid., p. 507.

56. Ibid., p. 508.

57. Ibid., p. 509.

58. Ibid., p. 522.

59. Ibid., p. 527. See also previous discussion of Lochner v. New York.

60. Ibid., p. 527.

61. Ibid.

62. Ibid., pp. 529-530.

63. Ibid.

64. See the Court's ruling in Miller v. California 413 U.S. 15 (1973). The Court ruled that "community standards" could be used to define obscenity, essentially Balkanizing obscenity cases.

65. Griswold v. Connecticut, 381 U.S. 479 (1965): 530-531.

66. Brown v. Board of Education of Topeka Et. al., 347 U.S. 483 (1953): pp. 492-493.

67. Ibid., p. 495.

68. Some would argue that Brown is not an activist decision because it is based on the Equal Protection Clause. My own feeling is that **no** judge admits that he or she is being activist. All decisions are cloaked in the Constitution; though that cloak in some cases may be either very tangled or very thin.

69. Roe v. Wade, 410 U.S. 113 (1973).

70. Ibid., p. 164.

71. Ibid., p. 117.

72. Ibid., p. 152.

73. Ibid., p. 174.

74. Crosskey, op. cit., vol. I, p. 1.

75. Jerre S. Williams. The Supreme Court Speaks, (Austin, Texas: University of Texas Press, 1956), p. viii.

76. Ibid., p. 6.

77. Ibid., p. v.

78. Ibid., p. 3.

79. Ibid., p. 4.

80. Ibid., p. 14.

81. Ibid.

82. Ibid., pp. 7-8.

83. Ibid., p. 9.

84. Ibid., p. 11.

85. Ibid., p. 50.

86. Gibbons v. Ogden, 9 Wheaton 1 (1824).

87. South Carolina v. Baker, 383 U.S. 301 (1984).

88. Ibid., p. 53.

53. Crosskey, op. cit., vol. I, p. 55.

90. Ibid., p. 55.

91. See Marshall's opinion in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

92. Crosskey, op. cit., p. 84.

93. Ibid., p. 116.

94. Ibid, p. 196, footnote.

95. Ibid., p. 374.

96. Ibid., p. 379.

97. Ibid., p. 147.

98. Ibid., p. 149.

99. Ibid., p. 295.

100. Article I, Section 10.

101. Kelly, Harbison, and Belz, op. cit., p. 204.

102. Ibid., p. 234.

103. Crosskey, op. cit., pp. 295-298.

104. Ibid., p. 298.

105. Ibid., p. 311.

106. William Jeffrey Jr. is Crosskey's coauthor for Volume III. Crosskey died while the volume was in preparation.

107. William W. Crosskey and William Jeffrey Jr., Politics and the Constitution, Vol. III, (Chicago: University of Chicago Press, 1980) p. 12. Jeffrey is the sole author of the introduction, since Crosskey, as noted earlier, had died just prior to the release of Volume III.

108. Crosskey, op. cit., pp. 299-303.

109. Ibid., p. 321.

110. Ibid., p. 324.

111. Ibid., p. 330.

112. Ibid., p. 351. This purpose for which the clauses are hardly needed is preventing retroactive criminal laws.

113. Article I, Section 10, Subsection 1.

114. Ibid., p. 352.

115. Ibid.

116. Crosskey, op. cit., p. 353.

117. Kelly, Harbison, and Belz, op. cit., p. 199. Sturges v. Crowninshield, 4 Wheaton 122 (1819).

118. Ibid., p. 200. Ogden v. Sanders, 12 Wheaton 213 (1827).

119. Ibid., p. 488.

120. 290 U.S. 398 (1934).

121. See Ibid. 350-355.

122. Jeffrey, op. cit., pp. 14.

123. Crosskey, op. cit., p. 360.

124. Jeffrey, op. cit., p. 7.

125. Crosskey, op. cit., p. 379.

126. Crosskey viewed the President as having a general executive power, just as Congress had a general legislative power. He seems to focus on Congress in this book, because, on the whole, the Presidency has been more successful in asserting it general grant of power.

127. Ibid., p. 384.

128. Crosskey, op. cit., p. 391.

129. Some particularly grievous offenders in this regard are former Attorney-General Meese, former President Reagan, and the senior Senator from North Carolina, Jessie Helms.

130. Crosskey and Jeffrey, op. cit., p. 4.

131. Ibid., pp. 5-6.

132. Ibid., p. 4.

133. Ibid.

134. Crosskey, op. cit., p. 313.

135. Ibid., p. 329.

136. Paul Ricouer, quoted in Louise Phelps, Composition as a Human Science, (Berkley: University of California Press, 1989) p. 210.

137. Previously cited.

138. Ibid. p. 707.

139. John A. Rohr, To Run a Constitution, (Lawrence, Kansas: University of Kansas Press, 1986) p. 172.

140. Christopher Baldwick, Oxford Dictionary of Literary Terms, (Oxford: Oxford University Press, 1990) p. 97.

141. Rohr, op. cit., p. 258.

142. Scholes, in his final chapter, expresses the same fear about Fish's interpretive communities. See footnote 72 for my source on the quote by Hughes that "the Constitution is what judges say it is." Rohr does not attribute the quote.

143. Rohr, op. cit., p. ix.

144. Ibid., p. 172.

145. Ibid., p. xii.

146. Ibid., p. 1.

147. Similarly, Christian sects differ on whether to interpret the Bible literally, focusing on the determinate meaning of the text, or in the context of centuries of interpretation. A notable example of this differing approach to reading is evident in the developing schism in the Southern Baptist convention between literalist fundamentalists and moderates, who admit interjecting some interpretation into their readings of the Bible.

148. Ibid., p. 216.

149. Ibid., p. 5.

150. Ibid., p. 7.

151. Ibid., p. 9.

152. See Ernest L. Fortin, "Saint Thomas Aquinas," in Leo Strauss and Joseph Cropsey, History of Political Philosophy, Third Edition (Chicago: University of Chicago Press, 1987), pp. 250-253.

153. Thomas Kuhn, The Structure of Scientific Revolutions, Second Edition, Revised and Enlarged (Chicago: University of Chicago Press, 1970).

154. Kuhn, op. cit., p. 92.

155. Ibid., p. 159.

156. See Kuhn's section XIII in particular for an extended discussion of this point: Ibid., pp. 160-173.

157. Stanley Fish, Is There a Text in this Class?, (Cambridge, Mass: Harvard University Press, 1980), p. 305.

158. Peter Berger and Thomas Luckmann, The Social Construction of Reality, (New York: Doubleday, 1966).

159. Fish, op. cit., p. 305.

160. Ibid., p. 284.

161. For Kuhn's discussion of scientific communities, see Kuhn, op. cit., pp. 23-34 and 181-186.

162. Fish, op. cit., p. 323-324.

163. Ibid., pp. 13-14.

164. Ibid., p. 347.

165. See footnotes 72 and 134.

166. Ibid., pp. 345-347.

167. As Scholes remarks, E.D. Hirsch has been advocating a "best" or "strongest" reading of text for years.

168. Robert Scholes, Textual Power: Literary Theory and the Teaching of English,(New Haven: Yale University Press, 1985), p. 17.

169. Ibid., p. 150.

170. Ibid., p. 151.

171. Ibid., p. 13.

172. Ibid., p. 156.

173. Ibid., pp. 153-154.

174. Ibid., p. 157.

175. Ibid., pp. 160-161.

176. Ibid., p. 165.

177. George Will, "History and Its Devaluation," Iowa City Press Citizen, May 2, 1991.

178. Rohr, op. cit., p. 9.

179. Jeffrey, op. cit., p. 4.

180. Jean-Jacques Rousseau, The Social Contract, trans. Maurice Cranston (New York: Penguin, 1968).

181. Ibid., 4.9, p. 186.

182. Ibid., p. 189.

183. Gary Wamsley, et. al., Refounding Public Administration, (Newbury Park: SAGE, 1990). I will confine my discussion of the work to Wamsley's introduction and to the piece written by all the authors except Boster and Kronenberg, entitled "Public Administration and the Governance Process: Shifting the Public Dialogue." This later piece is commonly referred to as the "Blacksburg Manifesto."

184. Ibid., p. 23.

185. Ibid., p. 45.

186. Ibid., pp. 33-34.

187. Ibid., p. 45.

188. I pursue this point further in my final five paragraphs.

189. Ibid., pp. 46-47.

190. Ibid., p. 46.

191. Ibid., p. 50.

192. Ibid., p. 47.

193. Ibid., p. 16.

194. See in particular Herbert Kaufman, in Ibid., pp. 313-315. Interestingly, Wamsley's editing allows Kaufman to have literally the last word in the volume.

195. For a listing of the reviews of Crosskey's first two volumes see: William Jeffrey, Jr., "American Legal History: 1952-1954," in 1952 Annual Survey of American Law, 866, at 881.

196. This is if my own impressionistic observations can be taken as any guide.

197. David H. Rosenbloom. Public Administration and Law: Bench v. Bureau in the United States. (New York: Marcel Dekker, 1983), p. 218.

198. Ibid., p. 224.

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